124-64

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 120.

HENRY C. ROBERTS AND ARCHIBALD S CLARKE,
PLAINTIFFS IN ERROR,

vs

HENRY M. BENJAMIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 17, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 7, 1887.

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1 United States Circuit Court for the Northern District of New York.

HENRY M. BENJAMIN, Plaintiff,

against

HENRY C. ROBERTS and ARCHIBALD S. CLARK, Defendants.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of the service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, at the city of Utica, this 23d day of June, in the year one thousand eight hundred and eighty-two.

[L. S.] WILLIAM H. BRIGHT, *Clerk.*

MESS. HALE & BULKLEY,
Plaintiff's Attorneys.

Office and post-office address, Albany, N. Y.

(Indorsed:) United States circuit court, northern district of New York. Henry M. Benjamin *vs.* Henry C. Roberts & —— ——. Summons. Hale & Bulkley, plaintiff's attorneys.

UNITED STATES OF AMERICA, }
Northern District of New York, } *ss:*

I hereby certify that on the 1st day of July, 1882, at Rochester, I personally served the within summons on the within-named defendants by showing them the same and delivering to and leaving with each of them a true copy thereof.

C. D. MACDOUGALL,
U. S. Marshal,
By J. M. BARDWELL, *Deputy.*

(Filed July 6, 1882.)

WILLIAM H. BRIGHT, *Clerk.*

2 NORTHERN DISTRICT OF NEW YORK, *ss:*

Circuit Court of the United States, Northern District of New York.

HENRY M. BENJAMIN

against

HENRY C. ROBERTS and ARCHIBALD S. CLARKE.

The above-named plaintiff, Henry M. Benjamin, who is a citizen of the State of Wisconsin, by Hale and Bulkley, his attorneys, complains of Henry C. Roberts and Archibald S. Clark, who are citizens

of the State of New York, defendants, and alleges, upon information and belief, as follows:

I. That the defendants are and were at the times hereinafter mentioned partners doing business in the city of Rochester, in said district, under the firm name of H. C. Roberts & Co., and were engaged in the business of manufacturing and selling iron in said city.

II. That on or about the 17th day of July, 1879, this plaintiff telegraphed to the defendants under their said firm name asking them to give their lowest price for four hundred tons of No. 2 and four hundred tons of No. 1 iron, or one cargo of each delivered afloat at Milwaukee.

III. That in response to the enquiry by telegraph above mentioned the said defendants, under their said firm name, on the 22d day of July, 1879, telegraphed to this plaintiff as follows: "Nineteen fifty, number one foundry, delivered afloat, Milwaukee, cash; cannot promise any amount number two," and on the next
3 day wrote and sent by mail to the plaintiff a letter, of which the following is a copy:

"ROCHESTER, N. Y., *July* 23, '79.

"H. M. Benjamin, Esq.

"DEAR SIR: Owing to the writer being absent, your telegrams *was* not ans. until yesterday. There has been a very marked advance in iron. We shall have our furnace in blast about the first of Aug't, and am confident that we shall find ready sale for all our No. 1 at 18.50 at the furnace. Usually we do not make over 1 ton of No. 2 per day, all the iron being No. 1. For that reason we dare not quote any prices for that grade. Should we have any No. 2 it would be 1.00 less than No. 1. Should you ac'pt our offer of a cargo delivered in your city at 19.50 we would ship it about the 1st of Sept. Should ac'pt we would require an immediate answer, as there is a sharp demand, and to fill the order we should want to know in advance.

"Y., &c. "H. C. ROBERTS & CO."

That the said letter, of which the foregoing is a copy, was duly received by the plaintiff, and thereupon he wrote and caused to be mailed to the said defendants at their said place of business, by their said firm name, a letter, of which the following is a copy:

"MILWAUKEE, *July* 25, '79.

"Messrs. H. C. Roberts & Co., Rochester, N. Y.

4 "GENTS: Your telegram and your favor of the 23d to hand. I accept your offer for one cargo No. 1 at $19.50 afloat at Milwaukee, with the following additional agreement: If freights can be got less than one dollar per ton to Milwaukee I am to have the benefit of it; also you are to give me what No. 2 you can in this cargo at $1.00 per ton less. Terms to be 4 mos., 30 days with't in't.; 7 % in't.

"Hoping that this will be satisfactory and awaiting your reply,

"I am, gents, yours resp.,

H. M. BENJAMIN."

That afterwards, and in answer to the letter of which a copy is last above set forth, the said defendants addressed and mailed to this plaintiff a letter, of which the following is a copy:

"ROCHESTER, N. Y., *July* 28, '79.

"H. M. Benjamin, Esq., Milwaukee, Wis.

"DEAR SIR: Your favor of the 25th accepting our offer for one cargo No. 1 foundry iron at $19.50 per ton, del'd afloat in your city, with the condition that should we get lake fr'g'ts less than one dollar per ton that you are to have the benefit of it, terms 4 months paper, with in't add. after 30 days at 7%, is accepted and your order entered; also, should we have any No. 2 to let you at the same terms of payment, &c., at $18.50.

"We will, if nothing happens and prevents, have the furnace in blast 2 weeks from to-day, and will ship you the iron as soon as we can m'f'g it.

"Yours &c., H. C. ROBERTS & CO."

5 That the said letter, a copy of which is last above set forth, was received by this plaintiff in due course of mail.

IV. That the term "cargo," as used in the foregoing correspondence, was understood and intended to be a cargo or load of five hundred tons.

V. That this plaintiff, relying upon the contract and agreement made between plaintiff and defendants as above set forth and upon the promises of defendants, and expecting to receive the said cargo of five hundred tons of No. 1 iron on or about the first day of September, 1879, made contracts with divers persons to sell and deliver portions of said iron.

VI. That, although the plaintiff was at all times ready and willing to perform the said contract on his part and to pay for the said cargo of iron when received in manner agreed upon in and by said contract as aforesaid, the defendants wholly neglected, failed, and refused to perform their part of said contract and wholly failed, neglected, and refused to ship to this plaintiff, at Milwaukee, the said cargo of iron or any portion thereof.

VII. That in consequence of the said failure of the said defendants to perform their part of said agreement and to ship to this plaintiff the said cargo of iron this plaintiff sustained great damage and was put to great inconvenience and was unable to fulfil many contracts and engagements which he entered into in reliance upon the said agreement of defendants, and lost the profits upon said iron which he would have made if the defendants had fulfilled

6 their said agreement; in all to plaintiff's damage of ten thousand dollars, for which sum, together with the costs of this action, he claims judgment.

HALE AND BULKELY,
Attorneys for Plaintiff.

EASTERN DISTRICT OF WISCONSIN, *ss:*

Henry M. Benjamin, the above-named plaintiff, being duly sworn, says that the foregoing complaint is true of his own knowledge, except as to those matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

HENRY M. BENJAMIN.

Sworn to before me this 19th day of June, 1882.

[L. S.] GEO. H. NOYES,
Notary Public, Milwaukee County, Wisconsin.

(Indorsed:) Circuit court, northern dist. of New York. 2409. Henry M. Benjamin against Henry C. Roberts and Archibald S. Clarke. Complaint. Hale and Bulkley, plaintiff's attorneys, 25 North Pearl street, Albany, N. Y. Filed Jun- 28, 1882. William H. Bright, clerk.

7 Circuit Court of the United States, Northern District of New York.

HENRY M. BENJAMIN
vs.
HENRY C. ROBERTS and ARCHIBALD S. CLARKE.

First. The above-named defendants, for answer to the complaint of the plaintiff herein, admit that they are and were partners as in the complaint alleged, and they admit that they received the telegram of July 17, 1879, and they admit that they wrote the letter dated July 23d, 1879, and that the plaintiff received the same; and they admit that they wrote the letter dated July 28th, 1879, and that the plaintiff received the same, as the said letters and telegram are set out in the complaint.

And these defendants, further answering, deny that the term "cargo" was understood as a load of five hundred tons, but say that it was understood as a load of not over four hundred tons.

And these defendants, further answering, deny that the plaintiff was ready and willing to perform the contract on his part, and deny that they refused or neglected to perform the contract on their part, but, on the contrary, they say that they were at all times ready to perform their contract upon the performance by the plaintiff of the conditions imposed upon and agreed to by him.

8 And these defendants, further answering, say they have no knowledge or information sufficient to form a belief as to any allegations contained in the complaint not hereinbefore specifically admitted or denied, and therefore they deny each and every such allegations.

Second. And for a further and separate answer unto said complaint these defendants say that during the month of July, 1879, and prior thereto, the plaintiff was indebted to them in the sum of $796.99 for coal and iron sold and delivered by these defendants to the plaintiff at his request; that as a part of the contract as to the

sale of iron between the plaintiff and defendants aforesaid, upon which this action is brought, it was a condition that the plaintiff should pay to these defendants the sum so due from him, viz., $796.99; that these defendants requested the plaintiff to pay the same, and offered to and were at all times ready to perform the said contract on their part upon the payment to them of the sum so due them, and still are ready so to perform the same; but the plaintiff has at all times neglected and refused to pay the said sum.

Third. And for a further and separate answer unto the complaint the defendants say that prior to the delivery of the iron and coal in the second answer set forth, and between the 28th of April, 1876, and the 5th of October, 1878, they had sold and delivered to the plaintiff, at his request, at Milwaukee, large amounts of coal; that the plaintiff had received the same and claimed to the defendants to have weighed the same and had reported to these defendants
9 various items of shortage in the cargoes of coal by them sent to him, and they, believing his said statements, had allowed him therefor at various times various sums, amounting in all to $1,926.73; that these defendants first became aware in September and October, 1879, that the said statements as to weight made by the plaintiff to the defendants were false and so known to be by him, and that the amount which he had received from them for shortage was unlawfully obtained from them by his unlawful act; that they thereupon demanded the said sum of him and demanded he should pay the same before they would deliver the said iron, and they then were and at all times have been and now are ready and willing to deliver the said iron upon the plaintiff's paying to them the said sum of $1,926.73, which he then justly owed them; that the plaintiff refused and neglected to pay the same and still does so refuse and neglect; that the said contract for iron was made in ignorance of the facts aforesaid and in ignorance of the unlawful acts and the untruthfulness of the statements of the plaintiff in his dealings with the defendants down to that time, and was induced by the said false and fraudulent statement and acts of the plaintiff.

Fourth. And for a further and separate answer to the complaint the defendants say that on the first of August, 1879, the plaintiff was indebted to them in the sum of $796.99, with interest from September 24th, 1879, for coal and iron of that value sold and delivered by these defendants to the plaintiff, at his request, at Rochester, New
10 York, prior to August 1st, 1879, being the balance of account of a certain quantity of coal and iron so sold to the plaintiff; that the plaintiff has neglected and refused to pay the said sum, though often requested so to do, and the same is wholly unpaid, which said sum of $796.99, with interest from September 24th, 1879, these defendants will offset and counter-claim against any recovery the plaintiff may have herein, and for which said sum they demand judgment against the plaintiff.

Fifth. And for a further and separate answer these defendants say, upon their information and belief, that prior to the delivery of the iron and coal in the second answer hereinbefore set forth, and between the 28th of April, 1876, and the 5th of October, 1878, they

sold and delivered to the plaintiff, at his request, at Milwaukee, large amounts of coal; that the plaintiff received the same and claimed to the defendants to have weighed the same and reported to them various alleged items of shortage in the cargoes of coal delivered by them to him, and they, believing the said statements so made by him, allowed on the bill for the coal so delivered the amount of the shortage so claimed to the sum of $1,926.73.

And these defendants further say, upon their information and belief, that there was no shortage in the cargoes of coal so delivered and the statements of the plaintiff were false and known by him to be so, and the allowances made the plaintiff were not due him and were obtained upon his false statements and fraudulent acts; that the defendants first discovered the said statements were false
11 and there was no shortage in September and October, 1879; that they thereupon demanded of the plaintiff the said sum, but he refused and still refuses to pay the same, which said sum of $1,926.73, with interest from May 1st, 1877, these defendants will offset and counter-claim against any recovery the plaintiff may have herein, and for which said sum they demand judgment against the plaintiff.

Sixth. And for a further and separate answer unto the complaint the defendants say, upon their information and belief, that the plaintiff is indebted to them in the sum of $1,926.73, with interest from May 1st, 1877, for balance of account for coal sold and delivered by the defendants to the plaintiff at his request, at Milwaukee, between April 28, 1876, and October 5th, 1878; that the plaintiff, though often requested, has neglected and refused to pay the same, which said sum of $1,926.73, with interest from May 1st, 1877, the defendants will offset and counter-claim against any recovery the plaintiff may have herein, and for which said sum they demand judgment against the plaintiff.

Wherefore the defendants pray that the complaint be dismissed; that they have judgment against the plaintiff for $2,723.72, with interest on $796.99 from January 1st, 1879, and on $1,926.73 from May 1st, 1877, besides costs.

J. B. PERKINS,
Defendants' Att'y, 10 Elwood Block, Rochester, N. Y.

12 NORTHERN DISTRICT OF NEW YORK, } ss:
Monroe County, }

I, Archibald S. Clarke, being duly sworn, say I am one of the defendants named in the foregoing answer; that the same is true to my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

ARCHIBALD S. CLARKE.

Sworn to before me July 14th, 1882.
[L. S.]

DAVID HAYS,
Notary Public, Monroe County.

(Indorsed:) Law. 2409. U. S. circuit court, northern district of New York. Henry M. Benjamin *vs.* Henry C. Roberts and Archibald S. Clarke. Answer. Original. J. B. Perkins, solicitor for defendants, Rochester, N. Y. Filed Jul- 17, 1882. William H. Bright, clerk.

13 Circuit Court of the United States, Northern District of New York.

HENRY M. BENJAMIN
against
HENRY C. ROBERTS and ARCHIBALD S. CLARKE.

The above-named plaintiff, for reply to so much of the answer of defendants as is alleged by way of counter-claim, denies each and every allegation contained in the 4th item or paragraph of said answer, except said plaintiff admits an indebtedness to the defendants of the sum of one hundred & twelve & $\frac{73}{100}$ dollars on account of coal purchased prior to the 27th day of February, 1879.

Second. And for further reply this plaintiff admits that between the 28th day of April, 1876, and the 20th day of October, 1878, defendants sold and delivered to the plaintiff large amounts of coal, which were received by plaintiff, and that the plaintiff claimed to defendants to have weighed the same and reported to them various alleged items of shortage in the cargoes of coal delivered by them to him, which were allowed and agreed to by said defendants; but this plaintiff denies that the statements of this plaintiff in respect to such shortage were false or known by plaintiff to be so, and denies that the allowances made to plaintiff were not due him, or that they were obtained upon any false statements or fraudulent acts of plaintiff.

14 Third. And for further reply this plaintiff denies each and every allegation contained in the 6th item or paragraph of said answer.

Fourth. And for further reply this plaintiff alleges upon information and belief that he has fully paid the defendants for all the coal and iron delivered to the plaintiff by the defendants, and that no sum whatever is due or owing from the plaintiff to the defendants by reason of the matters alleged in said answer or any of them, except the said sum of one hundred and twelve & $\frac{73}{100}$ dollars.

HALE & BULKLEY,
Attorneys for Plaintiff.

EASTERN DISTRICT OF WISCONSIN, *ss:*

Henry M. Benjamin, the above-named plaintiff, being duly sworn, says that the foregoing reply is true of his own knowledge, except as to those matters therein alleged on information and belief, and as to those matters he believes it to be true.

HENRY M. BENJAMIN.

Sworn to before me this 28th day of July, 1882.

[L. S.] GEO. H. NOYES,
Notary Public, Wisconsin.

(Indorsed:) Circuit court of the United States, northern district of New York. 2409. Henry M. Benjamin against Henry C. Roberts and Archibald S. Clarke. Reply. Hale and Bulkley, attorneys for plaintiff, 25 North Pearl street, Albany, N. Y. Filed Aug. 3d, 1882. William H. Bright, clerk.

15 At an adjourned term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at Utica on the 18th day of March, A. D. 1884.

Present: The Honorable Wm. J. Wallace, judge.

HENRY M. BENJAMIN
against
HENRY C. ROBERTS and Another. } No. 2409.

On reading and filing the affidavit of James B. Perkins, after hearing Mr. Cogswell for the defendants and the motion to put the above case over the term and Mr. Hale in opposition thereto, it is ordered that said motion be denied, and further ordered that the motion for a new trial in the above action be heard before Hon. Alfred C. Coxe at his chambers, in Utica, April 1st, 1884, at 11.30 a. m.

WM. J. WALLACE.

(Indorsed:) Law. No. 2409. U. S. circuit court, northern district of New York. Benjamin *vs.* Roberts. Order. Filed Mar. 18, 1884. Wm. S. Doolittle, clerk.

16 United States Circuit Court, Northern District of New York.

HENRY M. BENJAMIN
against
HENRY C. ROBERTS & Ano.

It is hereby stipulated and agreed that this case go over the March term on the application of the defendants, without costs, upon condition that the plaintiff is at liberty to serve and file an amended complaint at any time within thirty days from date; the present answer to be deemed an answer to such amended complaint if the defendants shall so elect, the date of issue to remain as at present.

Dated March 10th, 1883.

J. B. PERKINS,
Def'ts' Att'y.
HALE & BULKLEY,
Pl'ff's Att'ys.

(Indorsed:) U. S. circuit court, northern district of N. Y. 2409. Henry M. Benjamin against Henry C. Roberts & ano. Stipulation. Filed Mar. 20, 1883. William H. Bright, clerk.

17 United States District Court, Northern District of New York.

HENRY M. BENJAMIN *against* HENRY C. ROBERTS and Others.

It is hereby stipulated that the complaint herein be deemed to be considered as amended by inserting therein between the paragraphs thereof numbered VI and VII, respectively, the following allegation:

"And plaintiff further says that at the time of the said breach of contract by defendants as aforesaid the market value of iron of the kind and quality agreed to be sold by defendants to the plaintiff as aforesaid, in the city of Milwaukee and vicinity, was much greater than the contract price of said iron, and that if said iron had been delivered pursuant to said contract plaintiff could have sold the same at great profit."

And it is further stipulated that no amended complaint need be served, but that the foregoing allegation may be inserted in the copy—pleadings to be prepared for the court, and that the same be deemed to be controverted by the answer already served.

Dated March 29th, 1883.

J. B. PERKINS,
Def'ts' Att'y.
HALE & BULKLEY,
Pl'ff's Att'ys.

(Indorsed:) U. S. dist. court. 2409. Henry M. Benjamin against Henry C. Roberts and others. Stipulation to amend complaint. Hale & Bulkley, pl'ff's att'ys, 25 North Pearl street, Albany, N. Y. Filed Dec. 1st, 1883. Wm. S. Doolittle, clerk.

18 U. S. Circuit Court, Northern District of New York.

HENRY M. BENJAMIN *against* HENRY C. ROBERTS & ANO.

It is hereby stipulated and agreed that the above-entitled action be referred to Ward Hunt, Jr., counsellor-at-law, of Utica, as sole referee to hear, try, and determine the issues therein; and it is further stipulated & agreed that judgment herein shall not be entered until after ten days' notice of the filing of the report of the referee and of the judgment proposed to be entered thereon; that the evidence may be taken in such places as in the judgment of the referee the convenience of the witnesses may require.

Dated June 19, 1883.

HALE & BULKLEY,
Pl'ff's Att'ys.
J. B. PERKINS,
Def'ts' Att'y.

(Indorsed:) 2409. Benjamin *vs.* Roberts. Stipulation of reference. Filed Jun- 19, 1883. William H. Bright, clerk.

19 At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the village of Canandaigua, on the 19 day of June, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Alfred C. Coxe, judge.

HENRY M. BENJAMIN *vs.* HENRY C. ROBERTS *et al.*

On reading and filing stipulation and on consent of counsel in open court—

Ordered that this action be referred to Ward Hunt, Jr., of Utica, to determine the issues therein; that judgment be not entered until 10 days after notice of the filing of the referee's report and the judgment proposed to be entered thereon.

And further ordered that the referee shall take the evidence in such places as in his judgment the convenience of witnesses may require.

ALFRED C. COXE.

(Indorsed:) 2409. U. S. circuit court, northern district of New York. Benjamin *vs.* Roberts. Order of reference. Filed Jun. 19, 1883. William H. Bright, clerk.

20 *Report of Referee.*

United States Circuit Court, Northern District of New York.

HENRY M. BENJAMIN
against
HENRY C. ROBERTS and ARCHIBALD S. CLARK.

To the circuit court of the United States in and for the northern district of New York:

I, the undersigned, the referee to whom were referred the issues in the action above entitled, do respectfully report that I have heard the allegations and proofs of the respective parties, and the arguments of counsel thereon, and, after due deliberation, report the following as my findings of facts:

First. The plaintiff is a citizen of the State of Wisconsin and resides in the city of Milwaukee, in said State, and the defendants, on and prior to the 17th day of July, 1879, were, have since then continued to be, and now are, citizens of the State of New York, residing at Rochester, in said State, and partners in business in said city, under the firm name of H. C. Roberts & Co.

Second. On or about the 17th day of July, 1879, the plaintiff inquired of the said defendants, by telegraph, their lowest price for four hundred tons of number two iron and four hundred tons
21 of number one iron, or one cargo of each, delivered afloat at Milwaukee; to which, on the 22d day of July, 1879, the said defendants replied by telegram, stating the price at nineteen dollars and fifty cents cash per ton for number one foundry iron delivered afloat at Milwaukee, and declining to put any price or to make any

agreement for the sale of number two iron, and in a letter written on the following day promised and agreed to ship a cargo of the iron about the first day of September, 1879, if the plaintiff should accept the offer.

On the 25th of July, 1879, the plaintiff by letter accepted the offer of a cargo of the iron, at $19.50 per ton afloat at Milwaukee, provided that the plaintiff should be allowed the deduction from the price per ton if freight could be had for less than one dollar per ton; and also provided that the terms should be, instead of cash, a credit of four months, with interest at the rate of seven per cent. per annum after thirty days.

The defendants, by letter dated July 28th, 1879, accepted the modification of the terms and conditions of sale, and agreed to ship the iron about Sept. 1st, 1879, or as soon as they could manufacture it.

Third. The term "cargo" employed in this correspondence was understood by the plaintiff and the defendants to mean a cargo of four hundred tons.

Fourth. The contract for the delivery of the cargo of iron had no relation to or connection with any other dealings between the
22 parties, and the performance thereof by the defendants was not conditioned upon the performance of any act on the part of the plaintiff other than as stated in the preceding findings.

Fifth. The defendants did not deliver the iron or any part of it to the plaintiff on or about the time specified in their offer, nor did they deliver it as soon as they had manufactured the required amount. They postponed the execution of the contract from time to time, and finally insisted, as a condition of the delivery of the iron, that the plaintiff should pay certain outstanding indebtedness on other dealings, which the defendants claimed to be due to them from the plaintiff; and also, as a further condition, that payment for the iron should be made upon delivery; that shipment should be by rail instead of by boat, and in installments of one hundred tons per month instead of one cargo of the full amount, and that the plaintiff should pay, in addition to the contract price, one dollar per ton for extra freight. The plaintiff did not comply with these conditions, and the iron has never been delivered.

Sixth. At the time when the letter containing these conditions was sent by the defendants to the plaintiff, November 7th, 1879, the market value of number one foundry iron of the kind manufactured by the defendants was thirty-four dollars per ton afloat in Milwaukee.

Seventh. From May, 1878, to November, 1878, the defend-
23 ants delivered to the plaintiff four hundred and thirty-five tons of iron, of the value of seventeen dollars per ton, to be accounted for by the plaintiff to the defendants at that price. The plaintiff has accounted and paid for all of this iron except 6 1979–2240 tons, for which amount payment has not been made, nor has the iron been returned to the defendants. A statement of this account was submitted by the defendants to the plaintiff, showing that there was due and unpaid thereon $117.02 on the 18th day of June, 1879.

Eighth. Between April 20th, 1876, and October 5th, 1878, the defendants sold and delivered to the plaintiff a quantity of coal, a statement of the weights and prices of which was rendered by the defendants to the plaintiff. Upon receipt of the cargoes at Milwaukee the coal was weighed at the dock by the plaintiff, and thereafter he submitted to the defendants a statement of the weights and demanded a deduction on account of shortage in weight which he claimed to exist. The defendants assented to and allowed the claim for shortage, and the plaintiff paid the balance of the account in full. The claim for shortage was made by the plaintiff in good faith, upon the basis of weights taken at his dock, and the defendants did not in any manner object to the plaintiff's claim until after he had insisted upon the performance of the contract upon which this action was brought.

Ninth. In the months of October and November, 1878, the defendants sold and delivered to the plaintiff coal at certain prices, which, with the interest added to the day of the adjustment of the
24 account, April 16th, 1879, amounted to the sum of twenty thousand three hundred and four dollars and seventy-one cents. Of this amount the plaintiff paid to the defendant sums of money from time to time, which, with interest to the said 16th day of April, 1879, amounted to nineteen thousand six hundred & seventy-eight dollars and ninety-four cents. A statement of said account was made by the defendants to the plaintiff, showing a balance due from the latter to the former on said day, amounting to six hundred and twenty-five dollars and seventy-seven cents. This balance has not, nor has any part of it, been paid by the plaintiff to the defendants.

Upon these facts I do respectfully report as my conclusions of law:

First. The plaintiff is entitled to recover from the defendants the difference between the contract price of the four hundred tons of iron which were to be delivered about the first of September, 1879, and the market value of the said iron afloat in Milwaukee, on the 7th day of November, 1879, when the contract was finally broken by the said defendants, amounting to the sum of five thousand eight hundred dollars, with interest from November 7th, 1879, to the date of this report.

Second. The plaintiff is indebted to the defendants in the sum of one hundred & seventeen dollars and two cents, with interest from June 18, 1879, for the 6 1979–2240 tons of iron as stated in the seventh finding of fact, amounting at the date of this report to the sum of one hundred and forty-eight dollars and twenty cents
25 ($148.20), and they are entitled to have the said amount offset against the amount otherwise due from them to the plaintiff, as stated in the first conclusion of law.

Third. The plaintiff is indebted to the defendants in the sum of six hundred & twenty-five dollars and seventy-seven cents, with interest from April 16th, 1879, for the balance of the account for coal sold to the plaintiff, as stated in the ninth finding of facts, amounting at the date of this report to the sum of seven hundred and ninety-nine dollars, and they are entitled to have the said amount

offset against the amount otherwise due from them to the plaintiff, as stated in the first conclusion of law.

Fourth. The defendants have not established their right to reopen the account between them and the plaintiff for coal delivered from April 20th, 1876, and October 5th, 1878, as stated in the eighth finding of facts, and they are therefore concluded by the settlement and adjustment made in that respect, and not entitled to the counterclaim in that behalf stated in their answer herein.

Fifth. The plaintiff is entitled to judgment against the defendants for the sum of six thousand two hundred and sixty-four dollars and twelve cents ($6,264.12), with interest thereon from the date
26 of this report, with the costs of this action, and judgment for that amount is accordingly directed.

Utica, N. Y., Nov. 27th, 1883.

WARD HUNT, JR., *Referee.*

Fees, $275.

(Endorsed:) U. S. circuit court, northern district of N. Y. Henry M. Benjamin against Henry C. Roberts *et al.* 2409. Report of referee. Filed Dec. 1, 1883. Wm. S. Doolittle, clerk.

27 MONROE, *ss:*

U. S. Circuit Court, Northern Dist. of New York.

HENRY M. BENJAMIN *ag'st* HENRY C. ROBERTS *et al.*

I, James B. Perkins, being sworn, say that I am attorney and counsel for the defendants in the above action; that the report of the referee therein was filed Dec. 1st, 1883, directing judgment for $6,225.00; that the case, in my opinion, presents close and difficult questions of law; that the defendants intend in good faith to move for a new trial before the circuit judge, and, if the motion is denied, to prosecute a writ of error to the U. S. Supreme Court and stay the collection of judgment by a proper bond; that they desire a reasonable stay for the purposes of preparing case and exceptions and making a motion for a new trial; that the depositions in the case were, by order of the court, taken off the files to use before the referee, but have been returned; that it will be necessary to have them in the exhibits for the purpose of preparing the case; that, as I believe, the defendants are entirely responsible.

J. B. PERKINS.

Sworn to before me December 7, 1883.

DAVID HAYS,
Notary Public, Monroe Co.

Resworn before me this 13th day of December, 1883.

ALFRED C. COXE,
U. S. Dist. Judge.

28 United States Circuit Court, Northern District of New York.

HENRY M. BENJAMIN
ag'st
HENRY C. ROBERTS & ARCHIBALD S. CLARKE.

On reading and filing affidavit of J. B. Perkins and other papers in case—

Ordered that the defendants have 30 days to make and serve proposed case and file exceptions, and in the meantime all further proceedings on the part of the plaintiff are stayed.

And if the case be so made and served then the entry of judgment herein is further stayed until the hearing and decision of a motion for a new trial on such case and exceptions.

Dec. 13th, 1883.

ALFRED C. COXE.

(Indorsed:) 2409. U. S. circuit court, north. dis. New York. Henry M. Benjamin ag'st Henry C. Roberts *et al.* Order for stay of proceedings. J. B. Perkins, att'y for def'ts, 10 Elwood b'ld'g, Rochester, N. Y. Filed Dec. 17, 1883. Wm. S. Doolittle, clerk.

29 At a term of the circuit court of the United States, held in and for the northern district of New York, at the court-house in Utica, on the 1st day of April, 1884.

Present: Hon. Alfred C. Coxe, judge.

HENRY M. BENJAMIN
against
HENRY C. ROBERTS and ARCHIBALD S. CLARKE. } At Law. No. 2409.

This case coming on for argument upon the motion of the defendants for a new trial, upon a case made therein, after hearing Mr. Perkins, of counsel for defendants, for said motion, and Mr. Hale, of counsel for plaintiff, in opposition, it is ordered that the said motion for a new trial be, and the same is hereby, denied, and that judgment be entered herein pursuant to the report of the referee, with costs.

ALFRED C. COXE.

(Indorsed:) U. S. circuit court, northern dist. of N. Y. Henry M. Benjamin ag'st Henry C. Roberts and Alexander C. Clarke. Order. Hale and Bulkley, plaintiff's att'ys, 25 North Pearl street, Albany, N. Y. Filed May 31, 1884. Wm. S. Doolittle, clerk.

30 *Judgment. June 3rd,* 1884.

Circuit Court of the United States, Northern District of New York.

HENRY M. BENJAMIN
against
HENRY C. ROBERTS and ARCHIBALD S. CLARKE.

This cause having, on the 19th day of June, 1883, been duly referred to Ward Hunt, Jr., Esquire, of the city of Utica, as sole

referee to hear and determine the issues therein, and having been brought on for trial before the said referee, and the said referee having made his decision and report herein, bearing date November 27th, 1883, and the same having been duly filed, whereby he finds and decides that the above-named plaintiff is entitled to judgment against the above-named defendants for the sum of six thousand two hundred and sixty-four dollars and twelve cents ($6,264.12), with interest thereon from the date of said report, with the costs of this action, and a motion for a new trial having been made and denied:

Now, on motion of Hale & Bulkley, attorneys for plaintiff above named, it is adjudged that Henry M. Benjamin, the above-named plaintiff, recover of Henry C. Roberts and Archibald S. Clarke, the above-named defendants, the said sum of six thousand two hundred and sixty-four dollars and twelve cents, together with one hundred and ninety-two dollars and eight cents interest on said sum
31 from the date of said report, and three hundred and ninety-nine dollars and seventy cents costs, amounting in all to the sum of six thousand eight hundred and fifty-five dollars and ninety cents, and that the plaintiff have execution therefor.

Judgment signed and entered this 3rd day of June, A. D. 1884, — 11 o'clock a. m.

W. S. DOOLITTLE, *Clerk.*

(Indorsed:) Circuit court of the U. S., northern district of N. Y. 2409. Henry M. Benjamin against Henry C. Roberts and Archibald S. Clarke. Judgment. Hale & Bulkley, pl'ff's att'ys, 25 North Pearl street, Albany, N. Y.

Damages	$6,456 20
Costs	399 70
Total	$6,855 90

Filed May 31, 1884. Wm. S. Doolittle, clerk.

32 *Case & Exceptions.*

U. S. Circuit Court, Northern District of New York.

HENRY M. BENJAMIN
against
HENRY C. ROBERTS and ARCHIBALD S. CLARK.

The issues in this action were by consent referred to Ward Hunt, Jr., to hear and determine, and the same coming on to be tried before him, the plaintiff called Henry M. Benjamin, who testified:

I am the plaintiff and live in Milwaukee, Wis.

The plaintiff then offered in evidence defendants' letter, dated Aug. 6th, 1879, copy hereto annexed, marked (1); also defendants' letter, dated Aug. 8, 1879, marked (2); also letter, dated Aug. 15, 1879, marked (3); also letter from plaintiff to defendants, dated Aug. 19, 1879, marked (4); also telegram from plaintiff to defendants, dated Sept. 2, 1879, marked (5); also telegram from defend-

ants to plaintiff, dated Sept. 3. 1879, marked (6); also letter from plaintiff to defendants, dated Sept. 3, 1879, marked (7); also telegram from plaintiff to defendants, dated Sept. 10, 1879, marked (8); also letter from defendants to plaintiff, dated Sept. 11, 1879,
33 marked (9); also letter from plaintiff to defendants, dated Sept. 13, 1879, marked (10); also letter from plaintiff to defendants, dated Oct. 4, 1879, marked (11); also letter from plaintiff to defendants, dated Oct. 13, 1879, marked (12); also letter from defendants to plaintiff, dated Oct. 22, 1879, marked (12½).

Copies of the foregoing are attached to the case.

The witness continued: I have not received from the defendants any iron since July 28, 1879. I have been in the business of buying and selling iron in Milwaukee since 1868. The usual mode of sending from Charlotte to Milwaukee in 1879 was by canal-boat through the Welland canal.

Q. What was the usual cargo through that route?

To this question the counsel for the defendants objected as incompetent, and that the term cargo could not be explained or shown in this way. The referee overruled the objection and the counsel for defendants excepted.

A. From 450 to 550 tons.

Similar objections were made and overruled to all similar questions as to the size of a Welland-canal cargo, and similar exceptions taken, and the same are not separately stated in the case.

Cross-examined:

I mean net tons. Iron is sold in gross tons. I do not know that boats passing through the Welland canal carry a larger weight of coal than of iron. I do know that 400 tons of iron would be loaded lower in the boat than coal—that is they would take less space. The weight of the load of iron would be more in the bottom of the boat than with coal.

On being shown exhibit (7) the witness testified:

The iron ordered from defendants had been sold to differ-
34 ent parties. It was all sold. It was sold after I bought it. I sold at different prices. I cannot give them. I do not know whether my books will show. I made a pencil memorandum. I have no memorandum now. The contracts were made immediately after the purchase of the iron. The order was given by me in July. I cannot say that any was contracted at over $20 a ton. I cannot now ascertain the prices at which I sold iron in August, 1879; don't know whether I can ascertain it at Milwaukee. I delivered iron to customers spoken of in the letter of September 3d. I delivered after the sales to them; can't give dates now; cannot ascertain from my book. I bought iron from other parties after September 1st, 1879; can't give the names. My books will not show. They will show when it was delivered to me and the price. I do not keep a memorandum on my books of orders for iron made by me.

Re-examined:

A gross ton, 2,240 lb; net ton, 2,000 lb. I had no written contracts with customers for sale of iron ordered by defendants. In 1879 I had a large number of customers. There was a large demand for iron at Milwaukee from September 1st to December 1st, 1879.

Recross examined:

I sold iron to various parties in Milwaukee in August and September in 1879. I sold it at the prices obtaining in Milwaukee at that time.

R. P. ELMORE, examined by deposition, testified as follows:

I am in the coal and pig-iron business. In 1879 I dealt in iron; knew the market value of certain kinds during the fall; know the comparative value of different kinds of iron I sell in the market.

35 Q. Will you state, as near as you can recollect, the market value of number 1 anthracite foundry iron in the Milwaukee market during the months of September, October, November, and December, 1879?

To this the defendants objected on the ground that it did not call for the proper rule of damages or the damages to which the plaintiff is entitled in this action.

The referee overruled the objection and the defendants excepted.

The referee ruled that objections might be considered as made and overruled to all similar questions as to the market value of iron, with similar exceptions, and the same are not separately stated in the case.

A. That fall, as I recollect. It was a peculiar fall. It had been low, but during those months that grade of iron was worth, I should suppose, at different times those months, anywhere from $28 to $32. I didn't sell any. I sold other kinds of iron. The prices that I named there were for that grade of good number 1 anthracite iron. That would be my opinion about it. We cannot get any more at Milwaukee than Chicago. We can get just as much less as we are a mind to. Our markets are usually the same. There would be a difference after navigation closes, if you were a going to bring it by cars, because it costs us 75 cents extra to get it from Chicago here—local freights. An ordinary Welland-canal cargo in coal, I should say, in the neighborhood of 450 to 500 tons—400 to 500 tons. Perhaps it might be some more; I don't know just exactly.

Cross-examined:

I figured net tons. Iron is sold in gross tons. In the fall
36 of 1879. I guess a sharp rise of iron began the latter part of September, and hadn't fairly started the early part of September.

ROBERT M. CHERRIE, examined by deposition, testified as follows:

I have been engaged in the iron business at Chicago since 1860. I know the market value of iron at Chicago and adjacent territory during 1879 and 1880. The market value in Chicago of number 1 anthracite foundry iron from the 1st to the 30th of September, 1879, was from $28 to $32. There were actual sales made of number 1 anthracite foundry iron of H. C. Roberts & Co., made during the month at that price. During October from $30 to $35. During November from $33 to $38. During December from $36 to $42. During January, 1880, and then along up to spring from $40 to $45. I think in September I bought 500 tons number 1 anthracite foundry iron, made by Roberts & Co., from their agents here, Roberts & Co., at $28 a ton, cash. The market value at Milwaukee is usually a little higher on account of the difference in freight. From 75 cents to $1 a ton usually. We began to feel the advance in the latter part of August and September. What we call "Welland-canal vessels" usually carry about 500 tons.

Q. What is usually understood by a cargo of iron?

Objected to. Overruled and exception.

A. When we speak of a cargo coming from Lake Ontario, we expect to get from 475 to 550 tons.

Counsel for the defendants asked to have the answer stricken out. Denied and exception.

Q. In ordering a cargo of iron of H. C. Roberts & Co., what would be the customary amount that would be expected to be received?

37 A. Well, usually, when we order a cargo of iron we specify how much we want.

Q. What would be understood by a cargo if it were not specified as large or small?

Objected to as incompetent. Overruled and exception.

A. Those canal vessels carry from 475 to 550 tons. We have had hundreds of them, and that is the way they run.

Cross-examined:

The price of iron began to fall in May or June, 1880. It fell about $10 or $12 a ton, but didn't go down as low as in July, 1879. We bought our Roberts' iron from Rogers & Co., and paid them. The difference of lake freights between Milwaukee and Chicago is 15 cents to 25 cents. By rail from 75 cents to $1. The price of lake freights from Charlotte to Chicago during September and October, 1879, was from $1.50 to $1.70 per gross ton. There are many brands of anthracite number 1 foundry iron and it is an article constantly dealt in in the market, both in here and in Milwaukee. The price at Chicago in the latter part of July, 1879, was between $20 and $21.

WILLIAM L. BROWN, examined by deposition, testified as follows:

I have been in the iron business in Chicago since 1865; know the market value of iron at Chicago in the fall of 1879 and winter of 1879 and 1880. I can't state the market price of number 1 anthracite foundry iron on September 1st, but through the month of September the market price for number 1 Crane anthracite foundry iron averaged from $30 to $32 a ton, during October from $34 to $36, and during November and December the same prices. In January, 1880, $38 to $42; for same kind of iron in February,
38 $41 to $45. Crane anthracite was worth from a dollar to a dollar and a half more than the average anthracite iron.

Crane iron demanded from a dollar to a dollar and a half a ton more than the Charlotte iron, known as Roberts & Co.'s. Markets at Milwaukee and Chicago run about alike, and did, at the best of my recollection, at that time.

Cross-examined:

The prices of iron in February, 1879, were the maximum prices. In April, 1880, the price had fallen about $10 a ton from February, and gradually declined during the summer.

There are a large number of manufacturers of number 1 anthracite foundry iron. It is an article of commerce largely dealt in and an article that can always be purchased in the Chicago and Milwaukee markets.

Redirect:

I do recollect, aside from reference to my books, that there was a rise in the price of iron commencing in August, 1879, and extending to February, 1880. The amount of an ordinary Welland-canal cargo of iron is 450 to 600 tons.

The plaintiff further offered in evidence letter from defendants to plaintiff, dated November 7th, 1879, marked (13); also letter from defendants to plaintiff, dated November 8th, 1879, marked (14). Copies are hereto annexed.

HENRY M. BENJAMIN recalled:

I have my letter-book before me. There is there copy of letter from me to defendants, dated November 25th, 1879. The original letter was in my handwriting and was mailed by me in Milwaukee.

Cross-examined:

At that time I put the letters in a box in my office; sometimes carried the letters to the post office; do not recollect taking
39 this to the post office. The mail box was a box kept by me where mail was deposited which was to be mailed.

Q. Was it the custom of your business for you or some one in your employ to take the contents of that box to the post office daily?

To this question the defendants' counsel objected as incompetent. The referee overruled the objection and the defendants excepted.

A. Yes.

The plaintiff offered a copy of the letter in evidence.

Defendants objected on the ground that it was not proved that the letter was mailed or received.

The referee overruled the objection and received the letter in evidence and the defendants excepted.

Copies hereto annexed, marked Exhibit (15).

The witness continued: I have received no communication from the defendants on the subject since the letter of November 8th.

The plaintiff here rested.

The defendants gave evidence proving from May, 1878, to November, 1878, the defendants delivered to the plaintiff 435 tons of iron, of the value of $17 per ton, to be accounted for by the plaintiff to the defendants at that price. The plaintiff has accounted and paid for all of this iron except $61\frac{9}{2}\frac{7}{4}\frac{4}{0}$ —, for which amount payment has not been made, nor has the iron been returned to the defendants. A statement of this account was submitted by the defendants to the plaintiff, showing that there was due and unpaid thereon $117.02 on the 18th day of June, 1879.

In the months of October and November, 1878, the defendants sold and delivered to the plaintiff coal at certain prices, which, with interest added to the day of the adjustment of the account, April 16th, 1879, amounted to the sum of $20,304.71. Of this amount the plaintiff paid to the defendants sums of money from time to time which, with interest to the said 16th day of April, 1879, amounted to $19,678.94.

A statement of said account was made by the defendants to the plaintiff, showing a balance due from the latter to the former on said day amounting to $625.77. This balance has not nor has any part of it been paid by the plaintiff to the defendants.

JOHN C. FLEMING, examined by deposition, testified as follows:

I am a member of the firm of Rogers & Co., dealers in iron in Chicago. Roberts & Co., number 1 foundry iron, manufactured at Charlotte, was sold by Rogers & Co. during the year 1879 at Chicago. During the month of August there was a slight advance in the market price. The principal advance was during the latter part of September. On August 18th it sold at $21 a ton cash; on August 20th, $22; fifty tons delivered at Detroit, four months' time; August 28th, $24.14, four months' time on track at Chicago; September 1st, $24.14, on track at Chicago, four months' time, or $24.64 delivered; same date, $24.50 cash; same date, $24.00 cash; September 18th, $26.00 on track, $26.50 delivered; September 19th, $26.00 on track; September 20th, $26.00 on track; September 22d, $28.50 on track; September 23d, $29.00 on track; September 24th, $31.00

on track; September 25th, $32.00 on track. These are the fair market prices for which this iron was at the various times selling at Chicago.

The market price at Milwaukee and Chicago would ordinarily be the same for this particular iron coming by cargo; if it came
41 by rail, the freight from Chicago to Milwaukee would be added. The lake freights from Lake Ontario and Lake Erie points to Chicago and Milwaukee are ordinarily the same. I don't know of any material difference in 1879. I know of the sale of this Roberts iron to Cherrie. Roberts & Co. sold us the iron at $27.00 per ton, delivered on cars in Chicago. It is a fact that during the latter part of Sept., 1879, the prices for iron continued capricious and uncertain. We have bought coal from the defendants from 1876 to 1882.

The defendants offered to show by the evidence of this deposition that the coal which was shipped by the defendants to Rogers & Co. were in the years 1876, 1877, and 1878, and the cargoes received by them were of the weights called for by the bills of lading, and to show by other evidence in connection with this that the coal sent to Rogers & Co. was shipped and weighed in the same manner as that sent to the plaintiff.

To this the plaintiff objected as immaterial and incompetent.

The referee sustained the objection, and the defendants excepted.

Being cross-examined, the witness testified:

The market value of this number 1 foundry iron at Chicago during the month of Oct., 1879, was from $32 to $34 per ton; the same for December; can't state the price for November; there was a rise after October. All the iron of Roberts & Co. was invoiced to us during the year 1879 that was sold in Chicago. There was a slight rise in iron in the latter part of August; I think it begun in the latter part of August, 1879. We made no sales of Roberts & Co.'s iron
42 during the months of November and December, because we were sold ahead. The sale to Cherrie was 500 tons.

Redirect:

Other brands of number 1 anthracite iron are sold at Chicago. A large amount of this Roberts iron was sold to A. B. Meeker & Co.—a thousand tons of it, and maybe more, at $24.00 a ton—I think the first half of Sept., 1879.

Recross:

The iron sold to Meeker & Co. was invoiced to us at $24.00 a ton, and sold by us and Meeker on joint account at current rates. I do not recollect what was received or whether it was sold soon or later. The sale of Sept. 23d of ten tons, at $29.00 a ton, was made to F. W. Gates, of Chicago. He ordered it shipped to E. P. Allen & Co., of Milwaukee, and it was so shipped.

The plaintiff's counsel then read from the direct examination of this witness the following testimony omitted by defendants' counsel:

A. We received 29 cargoes from Lake Ontario during 1879, which averaged 461½ gross tons. The capacity in gross tons of the smallest cargoes we received through the Welland canal during 1879 was 394 gross tons; that of the largest was 490 gross tons.

ARCHIBALD S. CLARK, being sworn, — :

I live at Rochester, N. Y., and am one of the defendants. In 1876, and down to the fall of 1878, our firm sold coal to the plaintiff. I know of shortages in coal charged to our firm by the plaintiff. (Witness shown paper). This shows the shortage charged. I sent a copy of that to the plaintiff in a letter of Nov. 8th, 1879.

The same was offered in evidence and marked exhibit (16).

I knew the manner in which the defendants' books were kept and charges made. The coal sold to plaintiff came from the
43 mines near Wilkes Barre. The Riverside Coal Co. and Forty-fort Co. shipped the coal. It was sent in railway cars. The cars were received at Charlotte and Buffalo. It was not reweighed at Charlotte. The coal was dumped from the cars into pockets and from there run into vessels. The numbers of the cars that went into the vessels were reported to us. We received from the coal companies manifests of shipments, giving date of shipment, numbers of the cars, sizes of coal, and weight of coal in car. We sent statement of the contents of the boats to the plaintiff. We checked the cars dumped in the vessels with the manifests sent from the mines, putting the weight of each car as received from the mines dumped in the boat. This was correctly done and compared after the entries were made. (Paper shown witness). I sent that statement about the time of its date, Sept. 24, 1879; offered in evidence and marked (17). Plaintiff has never paid the balance called for by that bill. I remember of sending an amount of iron to the plaintiff in May, 1879. I telegraphed the plaintiff to have the cargo weighed by the board of trade weigher instead of his own weigher. We received an answer from him; the same offered in evidence, marked Exhibit (18). The letter of June 23d, 1879, from plaintiff to defendants, offered in evidence, and marked Exhibit (19). I saw the plaintiff Sept., 1879, at our office, in the latter part of the month. Roberts, Benjamin, and I were present. Benjamin came to see why iron had not been sent. We had conversation about balance of old bill which he owed us. He did not want to pay more than $112 and some cents for the coal, and wanted us to cancel the iron account on the ground it was short. I said that the bills were correct and we thought he should pay them in full; some further talk,
44 and Roberts said he would not ship the iron until the old matters were settled up. I think this was Sept. 24th; nothing further said about that. We did not have any information that plaintiff's claim for shortages were wrong till the fall of 1879—October, I think. I did not see plaintiff again that fall. I do not remember of receiving the letter from him of Nov. 25, 1879.

Cross-examination:

The defendants proved statements of account rendered by defendants to plaintiff for coal sold during the entire period of the shortages shown by the Exhibit (16), in which statements the whole amount of the shortages so stated were allowed the plaintiff, together with his drafts for the payment of various balances thus shown and the receipts of the defendants on the said accounts.

Q. How much number 1 iron did the defendants manufacture in the fall of 1879?

To this the defendants objected.

The referee overruled the objection and the defendants excepted.

A. I think in the neighborhood of 4,000 tons. We sold in other parts of the country besides Chicago. The letter of Aug. 15th is in my handwriting. I think it was in Oct., 1879, we first became aware of the incorrectness of plaintiff's statements as to shortages. In September we had a suspicion of them from the way Benjamin had treated us in that last cargo of iron we shipped him; we had the suspicion all during the spring and summer. In September or October we had an interview with some of the captains that had delivered coal there; I think it was in October. We had no more information in September in regard to the incorrectness of these statements than we had after the receipt of the last
45 cargo by the way he made it overrun; that was in May. From May to October we had nothing more than a suspicion, which arose in our minds in consequence of the return of the shortage in May and our interview with the captain; that was in October. At the interview in September with the plaintiff we had no information that his statements made to us had been incorrect. The only ground of suspicion we had was the amount of shortage being claimed by him mostly when we were shipping to other parties. It was the amount of shortage the ground of our suspicions. The last claim for shortage was in May, 1879. We had information that these statements were false from W. C. Harry, captain of the schooner "Mary Lyon," who lives in Rochester; that schooner had carried coal from Charlotte to Milwaukee; received information from nobody else at that time; have since from the mate of that vessel—Paul Harry; from no one directly but those two; they did not weigh the coal; they took it from cars and took it from the weight given them that was given at the mines. They claimed to have been present when the coal was weighed at Milwaukee. They said they had signed receipts for the weight of coal as ascertained at Milwaukee on certain conditions, as they said. He said he accepted that on condition that the shortage be made good to him afterwards. Only one cargo was sent by the "Mary Lyon" to Mr. Benjamin that was short; that was on May 1st, 1877. The shortage on that was 17½ tons; in money, $72.62. There was no shortage of which the Harrys could have any knowledge, except that item of 17 tons, only in a general way. I have no information that the shortage claimed was incorrect from any person, except those two. I

have seen the mode of weighing coal at the mines. I
46 did not see this particular coal weighed. All I know about it is, when I have seen them weigh they weigh correctly and the way our weights hold out from shipment. We allow 20 pounds of sandage for every ton of iron at the furnace. The elder Harry's home is here; I don't know where Paul Harry's is. I think we had some conversation in regard to this before October, 1879, but I am not certain; I think it was the winter after he sailed. I don't think the first information received from the Harrys in regard to this shortage was in October, 1879. That is the first information I had direct from them, but they had given information probably to our shipping men before that. I had received information from others who professed to have got it from these men Harry. I had heard indirectly from these men Harry this same information long before October, 1879—perhaps the previous year before. I made no personal inquiry of these men until October, 1879. I did not get the same information the year before that I got directly from the officers of the vessel. They simply told the other people in regard to the shortage. They did not tell the mode of weighing—that is I did not hear from the other people the mode of weighing. I did not have the same information indirectly that I got in October, only I had heard it was short. I had heard that from Benjamin himself. We had from Benjamin himself the fact that shortage was claimed and we allowed it. We didn't make any inquiry of or try to see the captain and mate until October, 1879.

Redirect:

In the fall of 1879 the Harrys made certain statements to me as to what they had observed in Benjamin's weights. That in-
47 formation we had not received, directly or indirectly, prior to that time. Benjamin did not claim a shortage on every cargo we shipped him from 1876 to 1879, but did on more than half of the whole shipments. The coal for plaintiff was shipped and weighed in the same manner as all the coal we sold, to the best of my knowledge. At the mines the cars are run on scales, filled with coal, and weighed together, and then the weight of the car is deducted from the gross amount and three or four per cent. is allowed for any wastage in transportation. The weight is stated at three or four per cent. less than the amount the scales show. That is the allowance for any waste in transportation, transfer, and dust.

Letter from defendants to plaintiff, dated January 3d, offered in evidence, marked (20): letter dated June 2d, 1879, offered, marked Exhibit (21); also letter dated June 6th, 1879, offered, marked (22). These last two are from plaintiff to defendants. Also letters from defendants to plaintiff, dated June 6th and July 7th, marked (23) and (24).

HENRY M. BENJAMIN recalled.

I sent that telegram—same offered in evidence, marked (25). I think it relates to that cargo of iron I ordered. I could not tell you

who the customer was who was waiting. I don't know what customers I had during that summer in iron. I can't recollect customers, I have so many of them. When I sent this statement about having customers waiting I suppose I did have customers waiting.

Q. Have you any recollection?

A. I have not. When I sent the statement in September that I had orders for this iron I think I did have orders.

GEORGE C. HOPKINS sworn.

I have had the general charge of the blast furnace at Char-
48 lotte for eleven years; I am familiar with the boats in which iron is shipped from Charlotte to western points. I have been in the habit of shipping by these boats during these eleven years. The average weight of a cargo of iron for a boat going from Charlotte to Milwaukee is from 250 to 300 or 325 tons. A vessel won't take as much iron as it would coal; the average cargo of coal is more than that. This iron of course takes up a very limited amount of space as compared with coal; it lies heavier and dead in the vessel, and a vessel captain will invariably refuse to take as much iron because there would be no elasticity to it. This iron lies heavy and pounds down the vessel and don't give in a sea; that is the reason why they refuse to take as much iron as they will coal or grain. It is not the weight; it is the strain on the vessel. I know the market price of this Charlotte iron during the year 1879; I know of all the sales; the market price of Charlotte iron number 1 during the month of August was from $18½ to $19 per ton; on the 1st of September about $19; during the first half of September I think it got up to $21½ or $22; I think the average during September would be from $22 to $23. During the month of September the price of iron advanced; there were large variations—much more rapid than ordinary; large lots were sold at prices lower than small lots; we get more money for little lots than for large lots; we regard 500 tons as a large lot; 100 tons or less would be a small lot.

Cross-examined:

I am in the employ of the Charlotte Iron Works—the furnace where the defendants' iron is manufactured; they are the principal
49 stockholders. I had nothing to do with the sale of any iron except that manufactured at that place. My testimony as to the market value of iron was based entirely upon sales made there. We sold the Bigelow Manufacturing Co., of Medina, 400 tons in August, 1879, number 1, at $18½ at the furnace. I don't remember a sale to A. B. Meeker & Co., of Chicago. I didn't superintend sales made at Chicago. We shipped considerable to Rogers & Co. It was bought by them at a price that netted us $21 in Chicago. I think it was mostly local trade nearer home, except to those parties. If there were any sold in Chicago in August and September I knew of it. If any was sold by Roberts & Co. to people in Chicago I did not know of sales made in Chicago. I don't know of any sales made by defendants to parties in Chicago except Rogers & Co., during those months.

THOMAS U. POLLAY, testified:

I have managed the coal docks of H. C. Roberts & Co. at Charlotte for the last eight or nine years. I had charge of shipping coal sent by boat. It was all shipped through the same pockets; all measured into the boat in the same way. I was there from 1876 to 1879. We received the cars there from the railroad companies. We dumped them as they came along, different sizes into different pockets; took the number of each car. Then we had a manifest. We took the weights from the manifest, made a bill of lading. Sometimes we load three or four vessels in one day. We had the number of the car before it went into the pocket. We kept a record of the cars that went into each pocket. I think I kept it correctly. I copied it on a book there. When the vessel was loaded I reported on the back of the bill of lading to the office here of H. C.
50 Roberts & Co., the cars and numbers of cars that went into the boat; did it daily. If we loaded a vessel to-day or three vessels, we reported at night. The manifests of the cars were sent to Roberts & Co's. office, I suppose. I suppose it was correctly done. It was done correctly from me. I remember shipping a good many cargoes to Benjamin at Milwaukee. They were weighed in the manner I have stated and reported to the office of Roberts & Co.

Cross-examined:

I am a brother-in-law of Mr. Roberts. These cars came from the mines to Charlotte. They were not always loaded on the boats immediately on arrival. They stood on the cars maybe a day or two—some a longer and some a shorter time, depending upon whether the boats were ready to receive coal.

Q. You of course had no personal knowledge about what is the actual weight there?

A. I took the weight from the manifest that came from the mines. The majority of the coal came on dumps. From the platform of the car up to the top the cars are four or five feet high. Each pocket holds about 200 or 225 tons. It didn't often happen that the boat would be full before the pocket was emptied. I don't think we ever divided a pocket unless it went to the same party.

Q. Are you so clear about it that you can be positive you never did such a thing as to divide a pocket in that way.

A. I don't think we ever divided a pocket unless it went to the same party.

Q. Is that the strongest?

A. Yes, sir. The coal didn't remain on the cars until it was ready to be shipped. It was put into the pockets. Sometimes they would bring a train Sunday and would not dump it until
51 Monday. Sometimes it would be in the pocket a week or so before we put it into the boat. A pocket is ninety feet long and ten or twelve feet wide, built on the bank of the river; an iron train is lower down so as to run it from the pocket into the boat.

Redirect:

These cars are almost always unloaded as soon as received. I don't recollect ever breaking a pocket, unless all the coal was to go to the same customer.

HENRY V. SMITH testified:

I have been in the coal business here from 1876 to this time; my coal came from Wilkes Barre over the Lehigh road. I received a manifest accompanying the cars. I reweighed most of the cars I received.

The defendants offered to show by the witness and other witnesses, Mr. Yates and others, that during the years 1876 to 1879 other dealers in coal at Rochester received car-loads of coal weighed at at Wilkes Barre in the same manner that the cars were weighed delivered to the defendants, the contents of which were by them sent to plaintiff, and also manifests similar to those received by the defendants; that the witnesses reweighed the coal in the cars they received and the coal contained uniformly overran the amount called for by the manifest about two per cent.

Plaintiff objected to this as immaterial and incompetent.

The referee sustained the objection and the defendants excepted.

HENRY C. ROBERTS testified:

I am one of the defendants and a dealer in coal. I am familiar with the way the weights of coal sold to different customers was ascertained. The coal sold to Benjamin was weighed in the same way coal was for other customers, as far as I know. The sys-
52 tem we had was a uniform system, so far as I know. I had employees working under instructions from me. We shipped coal from Charlotte and Buffalo to other persons in the West between 1876 and 1879.

Q. Were there any complaints of shortages from 1876 to 1879 from any customer except Benjamin?

Objected to as immaterial and incompetent. Sustained and exception.

I have had to do with coal and weighing it for many years. In weighing by car-loads we get a clean weight of a certain quantity of coal—say ten or fifteen tons, as the size of the car-load may be; when in weighing from the vessel, they weigh from the wheelbarrow load; weigh onto a platform scale and weigh in small quantities, and generally, unless a man is a skillful, expert talisman, there are a great many of these drafts left off, a great many wheelbarrow loads missed. They fail to keep a record of them. There is not the same accuracy in small weights as in the large scales used by railroads. I have shipped cargoes of iron from Charlotte to western points. The average size through the Welland canal to western points is less than 300 tons. I remember of having a conversation with the plaintiff in the fall of 1879. I refused to deliver him this iron until

he settled his old account. I said to him we are ready to ship you the iron just as soon as you settle the back claim. He said he would pay it. That was the substance of the conversation; we told him that we were dissatisfied; we felt we had been wronged; that my confidence in him had been abused. I have been at all times willing to deliver the iron ordered in July whenever the plaintiff would pay his back bill.

53 Cross-examined:

I purchased the coal in the mines at Wilkes Barre; I was there every week or ten days during the period of our sales to Benjamin; I didn't see the exact coal weighed which was shipped to plaintiff. In testifying that coal was weighed the same way the other coal was, I am testifying to my belief; we had the railway reports to sustain my belief. Lehigh Valley R. R. weighed the coal, I judge from the reports received from the company. I saw some of the coal shipped to Benjamin; can't say I saw all. I don't remember plaintiff being here in 1878, when there was some question as to the amount of shortages he had claimed, and the account was compromised by his giving a note for one thousand dollars; can't tell what I claimed the old account to be in September, 1879, unless I refer to the books. I stated that he had abused my confidence; he had made cargoes of coal short when they were not short; had pretty sharp words. I think Mr. Benjamin claimed, in that conversation, that the shortages were correct; think he said he believed his scales were correct and the amounts were such as were reported to him by his weighers; I think I stated to him that on some portions he was wrong; told him the evidence was from the captain; can't say that I told him who it was; think I received information from Harry that led me to believe that his charges were incorrect sometime in the summer of 1879; don't remember who was present; there was a continual complaint about Mr. Benjamin from the captains all through; I think they commenced in 1878; think there was a complaint after the captains got around the second time; think 1878 was the last year we shipped him coal to any amount; don't remember
54 complaints in 1877; don't know but that I heard them; can't be positive whether we commenced shipping coal to Benjamin in 1875. Sometimes he reported shortage and sometimes he reported that the cargo overran; can't say that I heard no complaint about his mode of weighing and reporting until after the middle of 1878; think we heard complaints at all times; this commenced growing more and more; I had during all this period the active supervision of the business; I had knowledge of the statements sent Benjamin; in September, 1879, I had heard that the plaintiff was buying coal somewhere else; I knew we were not selling him coal.

Q. Do you mean to say, Mr. Roberts, that in that conversation you told him that if he would pay the account that you claimed was due you would at once ship to him a cargo of iron which you had contracted to send on?

A. I did, sir; I mean to say so; I think you will find it in my letters also; didn't say that if he would pay the old account I would

send him a hundred tons by rail upon his paying one or two dollars a ton more freight to Milwaukee and would let him have the balance through the winter and spring. I recollect, in February, 1879, receiving a statement that a note of $112.73, which we returned to plaintiff and refused to take (latter shown witness, dated February 26th, 1879); it is in my clerk's handwriting; same put in evidence, exhibit marked number 26½. Benjamin was either here himself later than September, 1879, or some one was here for him. My knowledge as to the weight of a cargo of iron comes from experience in shipping; I have myself personally known the
55 weight of cargoes of iron by our books; have known what we have shipped.

Redirect:

Navigation closes at Buffalo about the 10th of November. Insurance drops off. It is not safe to send after the 1st of November.

Recross-examination:

There was an extra hazard on insurance to the 1st of December, if I understand rightly. We may have shipped coal by steamer as late as November 25th; we can send by steamer later than by sail. Navigation at Charlotte closes ten days to two weeks earlier than from Buffalo. I received information about shortages from other captains, but I can't give their names.

It was stipulated that the weighers at Wilkes Barre would testify that the coal shipped from there to the defendants was measured correctly and the plaintiff had no evidence to contradict it, and such evidence is regarded as in the case. It was stipulated that the weighers from the Wilkes Barre mines would testify that the coal at Wilkes Barre so shipped was correctly weighed, and that the amount was correctly stated in the manifests of the cars, and that plaintiff would give no evidence to contradict it.

It was stipulated that the same evidence was to be deemed given on the part of the defendants in regard to the shipments of coal to Buffalo from the defendants to plaintiff, its weight at the mines, and its mode of shipment and reporting at Buffalo as was given in regard to the coal shipped from Charlotte.

It was conceded that the average time of a boat from Charlotte to Milwaukee was about ten days.

PAUL HARRY (evidence taken by deposition at Rochester, September 1st, 1883) testified:

56 I live in Rochester; am the captain of a vessel sailing on the lakes; began sailing in 1867; know the plaintiff; have delivered to him coal sent by the defendants; remember examining plaintiff's scales about seven years ago; at that time I was mate on the boat carrying a cargo of coal to Benjamin from Roberts & Co.; the coal was weighed off the boat; the scales were on the dock; the coal was carried from the boat in wheelbarrows and weighed on the scales as it was taken off. From half to two-thirds of the cargo

had been weighed out when I examined the scales. At noon when the men had stopped working I went up to the scales as they stood there and weighed myself; I weighed then from 218 to 220 pounds, and one of the scales showed 200 and the other 210 pounds.

I heard, but I don't know, that the shortage was about 17 tons on the cargo; my brother, the master of the boat, told me so. After that I had a talk with Benjamin about the shortage on the cargo of a boat of which I was master; I said to him that he ought to pay us the freight on it, and I couldn't see how it was that we were always short. Mr. Benjamin said if he paid us the freight on the shortage he would have to pay for the coal that was short.

Cross-examined:

I can't remember the times of these shortages. No one was present with me when I weighed myself. Sometimes when we delivered coal I used to weigh myself to try and see if the scales were right. These were small platform scales. I weighed myself a couple of days or so before that in Milwaukee at a ship chandler's store; my weight then was about 218 or 220 pounds; I can't say exactly. There were others in the store, but I can't name any one who was there.

57 There was no one present when I was weighed on Benjamin's scales. At one o'clock the two weighmen who weighed the coal came, and I told them they better fix their scales, and one of them got on one of the scales. I have never worked for Roberts & Co. I carried coal for them first about nine years ago, and have carried some off and on since; not much within the last two or three years until to-day. I am here loading for them to-day. I was not served with a subpœna on this examination. I came up to the city of my own accord. When I first told Roberts & Co. of weighing myself on Benjamin's scales, I don't know as I can tell; it was either this spring or last fall. I had never mentioned it to them before as I know of. I told Mr. Clarke; I think it was in their office; I don't remember exactly.

Redirect:

After I spoke to the weighers about Benjamin's scales, one of them weighed himself on them and then went to work and fixed up both scales.

Q. What did he say?

To this the plaintiff objected as hearsay and incompetent.

The referee sustained the objection and the defendants excepted.

They did not reweigh while we were there any of the coal they had weighed. This coal was put in with other coal. I don't know the names of the weighers.

The defendants here rested.

LEONARD SAUER, called by the plaintiff and evidence taken in Milwaukee in November, 1882, by deposition, testified as follows:

I live in Milwaukee. In 1878 and 1879 I was sealer of weights and measures of this city; my duty was to test weights. I tested

58 for Benjamin four scales; didn't test the two little ones in 1878; tested them in 1879; didn't test the little ones in 1878 because I couldn't go in every place to look for the scales. After sealing them it is customary to mark them with the year; didn't notice whether these had been marked previous years; found the scales all right both years.

Cross-examined:

Was never a sealer of weights and measures before 1878. Benjamin had two yards; I guess he received coal at both yards; don't know how many scales he had. I tested two scales in 1878—a big one on Reed street and a big one on Division street; don't know whether they were scales for iron or coal, or either. Staid there making the test about half or three-quarters of an hour; I don't know how long it takes. I tested those scales by the United States standard; got the test from the city. In 1879 I tested four for Benjamin—two little scales about 500 lb each on Reed street. It might be in June, 1879; I don't know when it was; don't know when I made the test in 1878; got my office May 24th, 1878; it was after that.

MARTIN J. EVISTON, examined at same time and place, by deposition, testified as follows:

Live in Milwaukee; was sealer of weights and measures of that city in 1877. Sealed the plaintiff's scales the last of June or the first of July, that year. I find them correct by the city standard. After I sealed them I marked them on top correct; think I sealed two scales—large scales—one on Reed street and one up in his yard.

Cross-examined:

I never sealed weights and measures before 1877.

Redirect:

McGrau was sealer in 1876; he is dead.

FRED. BAETKEE, examined at the same time and place by
59 deposition, testified:

I am plaintiff's foreman; have been nearly nine years. My business is to look after his work to look after the unloading the scales and so forth; that was my business from 1876 to 1879, both inclusive. I had to look after the scale, level it, and get a man to weigh the coal. We have one certain man who tends to the weighing. I had to level and balance the scales so the scales works right. I did that as to every cargo that was received by Mr. Benjamin of coal during those years. Before the cargo was unloaded I saw the scales were properly leveled and balanced and were correct; this applied to iron as well as coal. There was no cargos of coal and iron received and weighed that I did not inspect and level and balance the scales before it was unloaded.

Cross-examined:

During those years every cargo received was weighed. We never took the weight given in the bill of lading, but every cargo was weighed for Mr. Benjamin. Croissant did the weighing for Benjamin during 1876, 1877, and 1878. He and his man weighed all the coal Benjamin received. He attended to the weighing himself and had to hire some help with him; as long as it is only one scale running he done it himself. He often had more than one boat. He was weighing at different yards, and when that was so he had to have men to help him. He usually had men to help him in the boats he weighed for Benjamin. Benjamin pays for the weighing. Croissant never had no boys to help him do this work. He had young men there and sometimes old men that was well qualified. He mostly had the same men that he generally had. I couldn't tell you where he got those men. Those men put down the weights in books. Croissant had to figure it up in the first
60 place and then it would be figured up in the office. I didn't take much notice whether the cargoes received during this time generally fell short of the bill of lading; once in awhile I heard that they were short. I heard it pretty often.

PHILIP CROISSANT, examined at same time and place by deposition, through an interpreter, testified as follows:

I am sixty-six years old. I have lived in Milwaukee twelve years. I have been weighing coal since 1875. During that time I have weighed for Benjamin, for the brewers and millers, and whoever has called on me. I generally weighed for the coal dealers in this city. I weighed for Mr. Benjamin during the years 1876 to 1879, both inclusive, and 1880, 1881, and 1882, and before, as long as Mr. Benjamin got a coal yard. I weighed correct and put it down in the book. Mr. Baetkee balanced the scales and fixed it all right, and I see that it is right. Mr. Benjamin had nothing to do personally with the weighing the coal. I get my books in the office from the book-keeper. I weigh all the coal up there on Division street and for the other coal I got a young man, married man, who weighed right. I had good men there; one of them is a watchmaker, a good man that understood the business, as far as I see. I got him three or four years every year. The coal weighed for Mr. Benjamin was weighed correct.

Cross-examined:

I am a Bavarian. Came to this country in 1852, the 13th day of July. I read English good and I understand —. I cannot speak good English. I can write in English. In weighing the coal I have to add up the figures made by the men who give the weights. I studied arithmetic in Europe at Speyer. I was a student in the gym-
61 nasium four years. Besides the watchmaker I employed to do this weighing a man by the name of Fred. Fisher. Fisher worked before in a store; also employed two brothers; one is to work at the tailor business in the winter. He weighed for me

during the whole summer. The other, I don't know that he does anything. The other helps him a little. I gave them 15 cents an hour. They were older than twenty-one years; yes, all of them older; four or five years in America, and one is fifteen or sixteen years old when he came here. These men were all Germans. I didn't have any boys weighing for me between 1876 and 1879 that were under twenty-one. In this time I got other mens. I never had no boy under twenty-one years old. I am still weighing for Mr. Benjamin. I don't know whether Mr. Benjamin's clerk ever made any correction in my figures.

Redirect:

I think I didn't make no mistake in weighing. Maybe a person might make a mistake once; but I don't know that I made a mistake. I am quick in adding up.

HENRY S. SCHWIND, examined at the same time and place, by deposition testified as follows:

Have resided in Milwaukee for twenty-five years and over. For the last six years I have been plaintiff's book-keeper. I pay the freights on coal to the vessel captains usually and took their receipts. The vessels, as soon as they arrive at the dock, are moored and preparations are made to unload the vessel and the weighman is hired, whose business it is to superintend the weighing of every cargo. After the cargoes are weighed out he returns his weigh-books to me in the office, and either I or one of my assistants runs over those figures and satisfy ourselves that he has made no
62 errors; then from the figures as made out in those weigh-books I settle with the vessel captains for their freights. I invariably settle with the shippers on Milwaukee weights; the weights found here on weighing generally are short of the weights named in the bills of lading; sometimes they overrun. That was the case with some of the shipments from the defendants. I kept the accounts between defendants and plaintiff. I kept the accounts between defendants and plaintiff during the years I have been in plaintiff's employ. I have plaintiff's books of account here, showing the account between plaintiff and defendants. The books show that on the 11th day of August, 1879, there was coming to the defendants on the coal account $112.73; that balance is correct; the entries are in my handwriting, except one credit made by one of my assistants. The account between plaintiff and defendants was settled November 19th, 1878, and the books balanced. I arrived at the amount of shortages in making out the statement sent to defendants by figuring from the weigh-books delivered to me by the weighmaster. As a rule, during the years 1876 to 1879, inclusive, I figured and added up the amounts or columns of the weights returned to me by the weighmaster. I usually found the weights returned by the weighmaster correct; if there were mistakes I corrected them. I have here books of the iron account showing the account between the parties on the 11th of August, 1879; made the entries myself, as book-keeper; the entries are correct. The account

shows that on the 11th day of August, 1879, defendants owed plaintiff on the iron account $12.87. The iron was all weighed over team platform scales by the employees in the office. I looked after it personally; the weight was correct. The Welland-canal
63 cargoes, coming from Charlotte, ran from 475 to 550 tons; average, about 500; that is the ordinary and customary amount carried as a cargo by these canal-boats; I mean net tons. The average capacity of one of these boats is about 450 gross tons.

Cross-examined:

During the years 1876 to 1879 the great proportion of the cargoes of coal weighed at Benjamin's by Croissant ran short as compared by the bills of lading; as many as nine-tenths, I should think. Where a charge of shortage was made against the defendants the captain was not paid for freight according to the bill of lading, to my best knowledge and belief. I had charge of the payments. During the last two or three years we have bought coal from Buffalo, from the Delaware, Lackawanna and Western, and others. The weights of the Delaware, Lackawanna and Western coal, as made by Croissant, have generally been short as compared with the bills of lading; couldn't tell about the others without referring to the books. Croissant is paid from fifteen to twenty cents an hour for weighing. The iron sent to Benjamin to be sold on commission was weighed out on platform scales. I oversaw it personally. In consignment sales it makes no difference to Mr. Benjamin what the weight is. He only has the weights made by Croissant where he himself is the purchaser.

Redirect:

I have before me the journal and ledger. The journal contains the charges for shortage and the charges for drafts and the credits for defendants' cargoes. The original entries, as made at the time the transaction took place, those entries are all made by me except from the 18th day of July to the 1st of August. I was sick,
64 and entries were made by one of the boys in the office. After that I examined the entries and compared them to see whether they were correct in making out settlements with defendants. Those shortages that are referred to in defendants' accounts were entered from the tally-books which I received from the weigher.

The defendants objected to this evidence on the ground that the entry in the book is no evidence against the defendants.

The referee overruled the objection, and the defendants excepted.

The amounts of shortages were correctly entered on this journal from the tally-sheets given me by the weigher, and the amounts given in this journal are correct as obtained from the figures of the weigher. The other book before me is the ledger, the figures in which are in my own handwriting. I have before me the account kept with defendants during years 1878 and 1879; they were correctly posted.

The entries were received in evidence, showing the accounts between the plaintiff and defendants, as claimed by the plaintiff.

The defendants objected to the entries as above stated. The referee overruled the objection, and the defendants excepted.

Recross-examination:

The amount of the entire shortages that we charged was $1,926.73. I remember at the time the cargo schooner American reached here in the month of June, 1879, the defendants telegraphed the plaintiff to have it weighed out by the weigher of the board of trade. R. B. Rice was the weigher of the board of trade. We began to unload the cargo ourselves. After it was partially unloaded Mr. Rice was secured. That cargo, as weighed out, overran on coal and
65 slightly in iron. There was an overrun of coal on the P. R. Lock on the 10th of August, 1878. No overrun except on this one boat in 1878.

Redirect:

The first part of the cargo of the American was weighed by Croissant.

ROMANZO B. RICE, examined by deposition, testified as follows:

I am weighmaster of the chamber of commerce. I have weighed coal quite extensively for coal dealers, millers, and brewers. All the coal that I have weighed has come by steam or sail vessels. The schooner American, in 1879, was weighed under my supervision. I think it overran the bill of lading. They had commenced to weigh before I was called upon. I took charge, examined the scales, found them in good working order; correct as near as I could tell by examination.

Q. Is it usual that there is a shortage on most of the vessels you weigh out?

A. Well, you might say necessarily so, from the fact that weighing on small scales, we call it very fair weighing to have it within one ton in a hundred—one per cent. variation—particularly on steam coal. Perhaps one in ten may overrun from one amount to another. I have had them overrun as high as 60 or 70 ton, and then again there would be one ton or five ton or three ton. There is a small shortage naturally with the up beam of a small scale weighing those small amounts; compared to car weights it would be impossible to have it otherwise.

Cross-examined:

There are various things that would naturally make cargoes of coal short; in handling the coal there is a waste, and particularly with coal that is dusty when the wind is blowing. I know Mr. Croissant. He weighed for me more or less for the last three years.

66 Q. Do you regard him as a competent man?

A. Well, yes; a man that has done a large amount of weighing. I have not employed him for some little time. I found

mistakes in his figures, as I have with all men that weigh. I haven't seen a man yet that was perfect in figuring, and in examining I almost always find more or less mistakes. At times he is very correct and at other times he is not. I discharged him more for being a little tight and not doing his work as I wanted it done. At the time I let him go he had been steaming some and didn't do as he agreed to. He drank some. We handle a great many books and I have seen a book or two that there was some leaves missing from, but how they came out I don't know. There was one instance of that kind where I received the books from Mr. Croissant.

HENRY M. BENJAMIN, recalled, testified:

I did not personally attend to the weighing; I relied upon the persons whom I employed. The statements I sent the defendants were sent in good faith and in the belief they were correct. I was here in Rochester in September, 1879; came for the purpose of getting the iron I bought. Mr. Roberts, on my demanding the iron, said he would not deliver me the iron unless I would pay him the full amount of their claims. I asked them what the amount of their claims were; they told me so much. I said, I want a statement of the iron and coal separate. He made this up and handed — to me then and there. He handed them to me. After some more conversation I asked him if he would, on my paying this statement in full, agree to deliver to me at once the cargo of iron I ordered of him. He said, No, sir; he had not the iron, but would agree
67 to ship me at once 100 tons by rail, I to pay the additional freight, which is $1 or $2 per ton more than what the price was. They agreed to sell me the iron, and the balance he would try to give me a 100 tons a month, or as fast as he could during the winter and spring; that closed the transaction. These are the three papers he gave me; they were attached together at the time; the same were put in evidence, marked number 33. I at that time made a demand upon him for the iron. I claimed the cargo of 500 tons; I don't know whether he spoke of any amount, but he spoke of sending 100 tons a month, but I think he claimed the cargo should not be as much as 500 tons; I think he claimed it should be 400 tons; I think that was his claim, but we did not come to any settlement or agreement about it.

Cross-examined:

I offered to pay the bill if he would give me a cargo of iron.

Q. You testify when you were here—you orally said you would pay up the amount of the bill?

A. Yes, sir—no I did not; I asked him the question whether he would give me a cargo of iron if I would pay him in full; he said he would not; he had not the iron.

Q. Why did he say he wanted this iron shipped by rail? What difference did it make to him?

A. Because he did not have the iron; he did not have a cargo of iron ready; he had not but a hundred tons he would ship by rail to me, because he could not get a vessel to take a 100 tons.

I have hired Croissant for a good many years; he has done all my weighing.

Q. Did you believe him to be a correct weigher?

A. I did; he is a man who is employed by a great many people in Milwaukee.

68 The testimony here closed.

The defendants thereupon requested the referee to find as follows:

First. That on July 17th, 1879, the plaintiff wrote defendants asking price of a cargo of iron afloat at Milwaukee.

That on July 19th he telegraphed for answer to the above, saying, "Customer was waiting for answer."

That the defendants, on July 23d, offered one cargo number 1 iron delivered at Milwaukee for $19.50 per ton, to be shipped about September 1st, which offer was accepted by plaintiff.

The referee refused to find in this form, and the defendants excepted.

Second. That by a cargo was meant a cargo of a boat going from Charlotte to Milwaukee through the Welland canal.

The referee refused so to find and the defendants excepted.

Third. That the cargo of such boats varied from 250 to 550 tons.

The referee refused so to find and the defendants excepted.

Fourth. That the average cargo of iron carried by boats between those places was 325 tons.

The referee refused so to find and defendants excepted.

Fifth. That the shortages on coal charged were reported to the defendants, and they, believing them to be correct, allowed the same on their accounts against the plaintiff.

The referee so found.

Sixth. That the said shortages were not correct, and such coal was not correctly weighed at Milwaukee.

69 The referee refused so to find and the defendants excepted.

Seventh. That the defendants' weights thereof were correct, and the plaintiff was not entitled to said credits.

The referee refused so to find and defendants excepted.

Eighth. That the defendants offered to ship a cargo of iron on the plaintiff paying said accounts aforesaid and have been at all times ready so to do.

The referee refused so to find otherwise than as in his fifth and eighth findings, and defendants excepted.

Ninth. That the plaintiff resold the iron so ordered by defendants, as he notified them, at the then market rates in Milwaukee.

The referee so found.

Tenth. That during July and August, 1879, the market price of defendants' iron number 1 at Milwaukee was $20 per ton.

That on September 1st, 1879, the market price was $21.

That from September 13th to September 15th the average price of lots over 100 tons was $23 per ton, and of small lots $24 per ton.

The referee refused so to find and defendants excepted.

The referee thereafter made his report as appears on the files of the court, to which the defendants duly excepted as follows:

1st. They except to the third finding of fact—that the term cargo, employed in the correspondence, was understood by the plaintiff and defendants to mean a cargo of 400 tons.

2d. They except to the fourth finding of fact—that the con-
70 tract for the delivery of the cargo of iron had no relation to or connection with any other dealings between the parties, and the performance thereof by the defendants was not conditioned upon the performance of any act on the part of the plaintiff other than as stated in the preceding findings.

3d. The defendants except to so much of the fifth finding of fact as finds that they postponed the execution of the contract from time to time, and also to the finding that they finally insisted on any conditions for the delivery of the iron.

4th. The defendants except to the sixth finding of fact.

5th. They except to so much of the eighth finding of fact as finds the claim for shortage was made by the plaintiff in good faith upon the basis of weights taken at his dock, and the defendants did not in any manner object to the plaintiff's claim until after he had insisted upon the performance of the contract upon which this action is brought.

6th. The defendants except to first finding of law and the whole thereof.

7th. The defendants except to the fourth finding of law and the whole thereof.

8th. The defendants except to the fifth finding of law and the whole thereof.

71 EXHIBIT No. 1.

MILWAUKEE, *Aug.* 6, 1879.

Messrs. H. C. Roberts & Co., Rochester, N. Y.

GENTS: I am very much in need of the iron I ordered of you, and hope that you will not delay the shipment of same any, but ship just as soon as possible and be sure to send me along some number 1.

Please let me hear from you by return mail and oblige,

Yours respectfully, H. M. BENJAMIN.

EXHIBIT No. 2.

ROCHESTER, N. Y., *Aug.* 8, 1879.

H. M. Benjamin, Esq.

DEAR SIR: You favor 6th at hand. We are in hopes now of getting started next week, and your order will be filled as promptly as possible from the first iron we can make; will endeavor to give you a little number 2 on first vessel.

Yours truly, H. C. ROBERTS & CO.

EXHIBIT No. 3.

ROCHESTER, N. Y., *Aug.* 15, 1879.

H. M. Benjamin, Esq.

DEAR SIR: We lighted the fires in the furnace yesterday at 3 o'clock, and will soon have iron ready to ship. We wish to call your attention again to the old iron account which you agreed to settle, there being $6\frac{1}{2}\frac{9}{2}\frac{7}{4}\frac{9}{0}$ tons back yet, per our letter 24th
72 January. There is also a balance due us on coal account, 1878, of $625.77, due April 16th, 1879. We wish these old matters straightened up at once, and oblige,

Yours truly, H. C. ROBERTS & CO.

EXHIBIT No. 4.

MILWAUKEE, *Aug.* 19, 1879.

Messrs. H. C. Roberts & Co., Rochester, N. Y.

GENTS: Your favor of the 15th to hand; am glad that you will be ready to ship my iron soon; hope it will come forward without delay, as I am in want of it very much. As regards the settlement of balance you claim, will see you when I come East in September, and we will endeavor to settle it. I want to come East to purchase coal and iron for fall delivery; shall want about 1 to 2,000 tons more iron, and some coal. Will you please *and* inform me whether you will make much of the number 2 iron? And oblige,

Yours respectfully, H. M. BENJAMIN.

EXHIBIT No. 5.

Telegram.

MILWAUKEE, *Sept.* 2, '79.

To H. C. Roberts & Co., 17 Powers' Block, Rochester, N. Y.:

Have you shipped iron? Parties are waiting for it. We are out. Answer.

H. M. BENJAMIN.

73 EXHIBIT No. 6.

ROCHESTER, N. Y., *Sept.* 3, 1879.

Received at Mil. 11.30 a. m.

To H. M. Benjamin:

Iron not ready to ship yet. Doing best possible. When will you come East?

H C. ROBERTS & CO.

EXHIBIT No. 7.

MILWAUKEE, *Sept.* 3, 1879.

Messrs. H. C. Roberts & Co., Rochester, N. Y.

GENTS: Your telegram to hand saying iron not ready to ship, etc. I was in hopes you would have my iron shipped by September 1, as promised, so that I could deliver to my customers, who are after me daily, as they are in need of the iron, and I promised it to them early in September. Every pound of it is sold and hope you will not delay the shipment of it a single day—as you promised I should have the first lot—as my order was in ahead of some you may have now on hand. Please ship at once. I asked you what you will sell me one more cargo in addition to the one I purchased of you, but you have not answered my question. Please give me lowest price by return of mail and oblige,

Yours, respectfully, H. M. BENJAMIN.

P. S.—I want to go East some time during this month and as soon as I can get away so as to make my arrangements for
74 the shipment of coal and iron for this fall.

Please *and* give me your very lowest price on, say 3 to 5,000 tons hard coal, egg, range, and nut. I will send you settlement for old iron account in a few days.

H. M. B.

EXHIBIT No. 8.

Telegram.

MILWAUKEE, *Sept.* 10, '79.

H. C. Roberts & Co., 17 Powers' Block, Rochester, N. Y.:

Why don't you ship iron? Customers after me every day. Are entirely out. Answer.

H. M. BENJAMIN.

EXHIBIT No. 9.

ROCHESTER, N. Y., *Sept.* 11, 1879.

H. M. Benjamin, Esq., Milwaukee, Wis.

D'R SIR: Your letter 3d inst. and telegram of yesterday at hand. We have only got one hundred tons on dock now towards your order, and we are doing all we can to get enough for your cargo, but there were other orders put in, some before and some at same time of yours, which we must proportion with yours. We have been expecting to receive a letter from you every day with settlement of the old iron and coal account, and we trust you will not delay it any longer, as it is, to say the least, a little discouraging to try and ship more when those old matters continue to stand on our books.
75 In regard to another cargo — iron, we dare not make price now or promise it until we get the present order filled. Please give these matters your prompt attention and oblige,

Yours, respectfully, H. C. ROBERTS & CO.

EXHIBIT No. 10.

MILWAUKEE, *Sept. 13th*, 1879.

Messrs. H. C. Roberts & Co., Rochester, N. Y.

GENTS: Yours of the 11th inst. received. Referring to your previous letters and the terms of the contract between us as to the shipment of iron, you will see that the same was to be made about the first of September, and on the strength of that I made my engagements here. I have already suffered by its not being delivered as agreed, and shall be greatly damaged unless received at once. You will please therefore ship without delay as per order accepted.

As to the old matters to which you refer, I shall be East soon, as already stated, and then we can talk over the same and, I have no doubt, satisfactorily adjust them; but I do not see as they have anything to do with the iron you sold and are to deliver to me, and trust you will not insist in mixing them together.

Yours respectfully, H. M. BENJAMIN.

76 EXHIBIT No. 11.

MILWAUKEE, *Oct.* 4, 1879.

Messrs. H. C. Roberts & Co., Rochester, N. Y.

GENTS: Since my return from the East and the unsuccessful attempt to settle with you the old iron and coal accounts I have thought over the matter and have come to the conclusion that I would make one more effort to arrange an amicable settlement with you. There should be no misunderstanding between us as to what is due you upon those old accounts, but, as there seems to be one, I suppose we shall have to compromise the difference. With that in view I make you the proposition to pay you the full amount you claim upon the old iron account, and will divide the difference between us upon the coal account—that is, I will pay you ($474.31) four hundred seventy-four and $\frac{31}{100}$ dollars in full settlement of the two accounts.

I have concluded to do so not only to have the old matter settled, but to remove your objections to filling your contract to ship me a cargo of iron as agreed upon in July last. I have insisted and still insist, as you very well know, that the old coal and iron matters had nothing to do with the contract to ship the cargo of iron, and that the two should not be mixed up with each other in any way whatever. I now only consent to speak of them together that you may not have even the shadow of an excuse for not shipping the cargo of iron, as that was the only ground upon which you have refused to do it. If, therefore, you accept my proposition of settlement of the old accounts I shall expect you to ship me without fur-

77 ther delay a full cargo of 500 tons of iron to meet my engagements I have made upon the strength of your agreement last July. If this be satisfactory please let me know and I will forward draft at once, but if it is not, then tell me what you will do, as neither you nor I can afford to let this matter hang along any longer.

Yours respectfully, H. M. BENJAMIN.

EXHIBIT No. 12.

MILWAUKEE, *Oct.* 13, 1879.

Messrs. H. C. Roberts & Co., Rochester, N. Y.

GENTS: I wrote to you on the 4th inst. regards our matter, and have received no answer from you. Have you received my letter? If so, please answer by return of mail.

Yours respectfully, H. M. BENJAMIN.

EXHIBIT No. 12½.

ROCHESTER, N. Y., *Oct.* 22, 1879.

H. M. Benjamin, Esq., Milwaukee, Wis.

DEAR SIR: Your letter received. Mr. Roberts is absent. When he went away he left word that no "compromise" was to be in this matter, as you fully understood what was due us. We will not entertain any arrangement for shipment of either iron or coal until we have pay from you for our weights as billed.

Very respectfully yours, H. C. ROBERTS & CO.

78 EXHIBIT No. 13.

ROCHESTER, N. Y., *Nov.* 7, 1879.

To H. M. Benjamin, Esq., Milwaukee, Wis.:

We claim from you a balance which is the difference between the original manifest or bills for all coal and iron delivered to you and the amount you have paid us. We will prepare and forward to you a statement of the amount of this claim to-morrow, the 8th inst. Upon your depositing that amount in some responsible bank in the city of Milwaukee, to be paid us upon full receipt by you of the iron hereinafter mentioned, we will at once commence to ship you the four hundred gross tons contracted for in August last as the amount of the cargo, but now to be shipped by rail not less than 100 tons per month until all is shipped, and to be paid for by you as received, and, in addition to contract price, one dollar extra per ton for freight. The iron will be consigned to the bank holding the above money deposited and to be paid for on delivery. The terms of the contract for the iron, as made by the correspondence, to remain the same between us.

You may have until the first of December to examine the above statement and deposit the money, but no longer time.

H. C. ROBERTS & CO.

EXHIBIT No. 14.

ROCHESTER, N. Y., *Nov.* 8, 1879.

H. M. Benjamin, Esq., Milwaukee:

79 We herewith inclose statement mentioned in our letter of 7th inst, showing amount due $2,723.72, which we think you will find correct.

Yours truly, H. C. ROBERTS & CO.

EXHIBIT No. 15.

MILWAUKEE, *Nov.* 25, 1879.

Messrs. H. C. Roberts & Co., Rochester, N. Y.

DEAR SIRS: Yours of the 8th inst. enclosing statement rec'd. Your claim is a new one and entirely wrong and unjust. Inasmuch as I hold your receipts in full for payment of all coal shipped by you to me, except for a claim of $625.77, as shown by your statement of Sept. 24, 1879, given me, and for iron, except for claim of $149.14, as per your statement of the above date to me, you cannot expect me to allow this last statement to be either valid or true for any greater amount than claimed in those two. While expressly denying that I owe you any such amount as shown by the statements of Sept. 24, 1879, still, to avoid any further difficulty and to procure the iron contracted for in July and August last, I would agree to pay you the amount claimed in those statements on receiving the iron now, which should have been delivered by the contract some time ago. In doing this I would be paying you more than I owe you, and, besides, be forgiving you the damage I have already suffered by your not fulfilling your contract at the time specified. If you accept these terms please notify me at once.

Yours truly, H. M. BENJAMIN.

80

EXHIBIT No. 16.

ROCHESTER, N. Y., *Nov.* 8, 1879.

Mr. H. M. Benjamin, Milwaukee, Wis., to H. C. Roberts & Co. Dr.

Payments to be made in New York city funds. Terms cash.

To coal unpaid for as follows, being the difference of the original bill lad'g and the amount you paid us.

1876.				
April 28	To shortage, Nellie Wilder	$1 10	$5 45	$8 17
May 4	" J. M. Scott	1 05	5 20	6 50
July 3	" F. D. Barker	11 00	5 20	57 20
" 10	" H. M. Scoon	10 00	5 40	54 00
" 20	" G. C. Trumpff	11 00	5 51	58 30
" 31	" Horner	6 15	5 85	39 49
Aug. 19	" O. Mitchell	6 16	5 35	36 38
" 30	" Cortez	4 00	4 35	17 40
" 17	" Ida Keith	10 12	6 15	65 19
" 17	" "	7 11	5 85	44 17
Sep. 6	" L. Lenton	3 15	3 95	14 81
Oct. 3	" J. A. Noyes	9 10	4 05	38 47
" 18	" Lucerne	9 01	5 00	45 25
" 18	" "	4 04	4 75	19 95
Nov. 3	" Swallow	3 15	5 15	19 31
" 11	" A. B. Norris	10 09	5 40	56 43
" 11	" Surprise	6 00	5 15	30 90
" 11	" Granger	36 05	5 15	186 69
" 18	" Saveland	27 03		120 55
	Total			$919 16

81				
1877.				
May 1	To shortage, Mary Lyon	$17 10		$72 62
"	" P. B. Locke	4 13		18 80
" 4	" F. D. Barker	6 10		30 37
" 17	" C. G. Mixer	6 16		24 10
" 24	" G. G. Houghton	4 00		12 40
" 28	" Hattie Wells	27 00		87 75
" 30	" Minerva	2 10		7 75
June 22	" Saveland	7 16		28 87
July 7	" G. C. Trumpff	4 17		14 08
" 3	" Paige	6 15		27 02
" 21	" Ketcham	16 00		61 35
" 21	" Saveland	9 05		35 61
" 21	" Cortez	7 15		31 78
" 30	" Mitchell	8 00		25 60
Nov. 2	" West Side	8 10		29 52
" 10	" Abercoin	11 05		41 62
	Total	$149 02		$549 24
	Less overrun	25 15		100 81
	Balance			$448 43
1878.				
May 6	To shortage, G. G. Houghton	$9 00	$3 55	$31 95
"	" Phelps	5 00	3 60	18 00
"	" West Side	13 00	3 60	46 80
July 1	" J. Mathews	21 06		71 36
" 12	" J. R. Noyes	13 17		45 70
" 15	" W. Keller	7 02		21 66
" 29	" Itasca	5 15		18 98
82				
Aug. 13	" Mitchell	1 18	3 90	7 41
" 14	" Havana	6 00	3 40	20 40
"	" "	6 11	3 65	23 91
" 21	" Scott	24 03	3 40	94 25
"	" Cortez	4 01	3 40	13 73
" 22	" Mystic Star	8 00	3 30	26 40
" 24	" Monterey	2 00	3 90	7 80
"	" "	10 00	3 40	34 00
Sept. 12	" Itasca	3 10	3 60	12 69
" 11	" Rogers	4 00	3 70	14 80
" 13	" Mitchell	10 00	3 45	34 50
Oct. 5	" Montpelier	4 00	3 70	14 80
				$559 14
	Amount			$1,926 73
Sept. 24	To invoice rendered			796 99
	Amount due			$2,723 72

EXHIBIT No. 17.

Also marked 33 in case.

Statement of Iron Account Due.

ROCHESTER, N. Y., *Sept.* 24, 1879.

H. M. Benjamin, Esq., Milwaukee, in account with H. C. Roberts & Co., Dr.

To invoice rendered:

	Jan. 20. To $6\frac{19}{2}\frac{7}{2}\frac{9}{4}\frac{}{0}$ No. 1 iron, 17.00	117	02
83	Jan. 20. To $2\frac{17}{2}\frac{}{2}\frac{}{4}\frac{}{0}$ No. 2 iron, 16.00	32	12
		149	14
	Sept. 14. To interest 86 d's	2	49
	Am't	$151	63

Above find statement of account, for which please remit if correct, and oblige,

Yours respectfully, H. C. ROBERTS & CO.

Statement of Coal Account Due.

ROCHESTER, N. Y., *Sept.* 24, 1879.

H. M. Benjamin, Esq., Milwaukee, in account with H. C. Roberts & Co., Dr.

	1879.		
	April 16. To invoice rendered	625	77
	Sept. 24. To interest, 161 d's	19	59
		645	36

Above find statement of account, for which please remit if correct, and oblige,

Yours respectfully, H. C. ROBERTS & CO.

EXHIBIT No. 18.

MILWAUKEE, *June* 16, 1879.

H. C. Roberts & Co., 17 Power's Block.

American arrived Thursday night. Cargo part discharged on receipt of your message. Will secure board of trade weigher for balance.

H. M. BENJAMIN.

84 EXHIBIT No. 19.

MILWAUKEE, WIS., *June* 23, 1879.

Messrs. H. C. Roberts & Co., Rochester, N. Y.

GENTS: I have had the cargo of iron and coal weighed out and the result is as follows: Pig-iron weighs $252\frac{1}{2}\frac{7}{2}\frac{2}{4}\frac{0}{0}$ tons; take off 28 lb sandage to the ton and it makes it $248\frac{1}{2}\frac{0}{2}\frac{3}{6}\frac{3}{8}$ tons. The coal weighs out $247\frac{1}{2}\frac{3}{0}\frac{7}{0}\frac{6}{0}$ tons; consequently overruns $2\frac{1}{2}\frac{3}{0}\frac{7}{0}\frac{6}{0}$ tons.

Will you please *and* inform me if the above is satisfactory, so that I can send you settlement for same? Awaiting your reply, I am, gents,

Yours respectfully, H. M. BENJAMIN.

EXHIBIT No. 20.

ROCHESTER, N. Y., *Jan.* 3, 1879.

H. M. Benjamin, Esq., Milwaukee:

D'R SIR: Enclosed find statement of iron shipped you during 1878, with the exception of the ten tons of No. 2 shipped you Aug. 20th. We are prepared to furnish you sworn evidence that you have had all the iron billed you, so that without doubt you have made a mistake. The 10 tons No. 2 was left on the wharf several days and we have reason to think that some few pigs were stolen. All the balance was weighed direct onto the vessel. We have sold and shipped a good many thousand tons and have not (you being the only exception) had any claim for shortage, and it does not stand to reason that our weigher and all the balance of our customers are wrong in their weights and you alone are right, and

85 we positively refuse to allow any shortage outside of the 10 tons No. 2, and we are confident, if you examine into the matter, that you will find us correct. We will make draft at sight on you to-morrow for $371.90. This is the balance of amount you report as being sold to June 1st as to the balance on hand and the cargo of schooner America. We want an immediate settlement as per our figures, and unless we receive a favorable reply by the end of this week we will send a man to receive the cargo and the balance you have on hand, as we will not allow you to let our draft go to protest when you have more than enough of our property in your hands to cover it.

Yours, etc., H. C. ROBERTS & CO.

EXHIBIT No. 21.

MILWAUKEE, *June* 2, '79.

Messrs. H. C. Roberts & Co., Rochester, N. Y.

GENTS: Your telegram and bill of lading and bill of coal is to hand. Now, as regards the coal, I will say that I will take it, but not at $2.75 per net ton at Buffalo. I shall want 25 cents per ton off from that price. I write this so that we may not have any misunderstanding as to the price of the coal hereafter; so you will

please *and* send me a corrected bill. You forgot to put the 250 tons iron on the bill of lading, I find. Have not been East yet. When I go down will call and see you.

Please answer by return mail, and oblige,

Yours respectfully, H. M. BENJAMIN.

86 EXHIBIT No. 22.

MILWAUKEE, *June* 6, 1879.

Messrs. H. C. Roberts & Co., Rochester, N. Y.:

Your favor of the 3d, with statement of iron account, is at hand. Mr. Benjamin is at present down East, and will undoubtedly call on you. Your draft for $379.15 will be protected when presented.

We remain, yours truly, H. M. BENJAMIN, SCHWIND.

EXHIBIT No. 23.

ROCHESTER, N. Y., *June* 6, 1879.

H. M. Benjamin, Esq., Milwaukee, Wis.

DEAR SIR: Your favor of the 2d is at hand, stating that you will not receive the coal except at 25 cents off. Unless you take the coal at the bill price at $2.75 net and the iron as per our letter of the 3d, do not touch either the coal or iron.

We are fully aware of the market rates, and will gladly take the cargo ourselves.

Yours, H. C. ROBERTS & CO.

EXHIBIT No. 24.

H. M. Benjamin, Esq., Milwaukee, Wis.

DEAR SIR: Your favor of the 2d is at hand. We cannot understand why you should insist on us giving you 252 tons of iron for 250. You must see that there is no waste on Charlotte iron.

87 The iron is handled five times before it was weighed, so that any loose sand would have entirely come off. Again, you wrote us that this iron (the No. 2) you had sold. Is there any reason that you should order this customer 202 tons for 200? You must know that this is not business, and we cannot allow your claim. We would like to settle up the old commission account. We are confident that you are not entitled to the shortages you claim, and that if you will examine into it you will find that our invoice weights were correct; that your sales would prove it. Please attend to this at once.

We will make you a proposition for anthracite coal the latter part of this week.

Yours, etc., H. C. ROBERTS & CO.

EXHIBIT No. 25.

MILWAUKEE, WIS., *July* 19, 1879.

To H. C. Roberts & Co., 17 Powers Block:

Please answer by telegram quick. Customer waiting for answer.

H. M. BENJAMIN.

EXHIBIT No. 26½.

ROCHESTER, N. Y., *Feb.* 26, 1879.

H. M. Benjamin, Esq.

DEAR SIR: Your favor 17th duly received. We cannot accept the note $112.73 in settlement, and again return same
88 to you. We would prefer to let the matter rest until we can see you personally, as we think it can then be arranged more satisfactorily to both of us. Your favor 24th at hand and will have attention.

Yours truly, H. C. ROBERTS & CO.

89 U. S. Circuit Court, North. Dist. of N. Y.

HENRY M. BENJAMIN *vs.* HENRY C. ROBERTS *et al.*

I hereby certify that the annexed contains the evidence, exceptions, &c., in the above action as settled before me & order it filed in the U. S. clerk's office.

WARD HUNT, JR., *Referee.*

(Indorsed:) Case and exceptions. Filed August 26, 1884. William S. Doolittle, clerk.

90 U. S. Circuit Court, North. Dist. of N. Y.

HENRY M. BENJAMIN *vs.* HENRY C. ROBERTS *et al.*

It is hereby stipulated and agreed that the case and exceptions settled by the referee and used on the motion for a new trial contain the evidence and exceptions which, with the judgment-roll, constitute the record in the above action.

July 9, 1884.

J. B. PERKINS,
Def'ts' Att'y.
HALE & BULKLEY,
Pl'ff's Att'ys.

(Indorsed:) Stipulation. Filed August 26, 1884. William S. Doolittle, clerk.

91 United States Circuit Court, Northern District of New York.

HENRY M. BENJAMIN *against* HENRY C. ROBERTS *et al.*

James Breck Perkins, for the motion; Matthew Hale, opposed.

COXE, *J.:*

I have carefully examined all of the papers submitted on this motion, and have reached the conclusion that no error was committed by the referee which will warrant the court in setting aside his decision. The motion for a new trial is, therefore, denied.

(Indorsed:) Memo. of decision. Filed May 23, 1884. Wm. S. Doolittle, clerk.

92 United States Circuit Court, Northern District of New York.

HENRY M. BENJAMIN

vs.

HENRY C. ROBERTS and ARCHIBALD S. CLARKE.

To the judges of the circuit court for the northern district of New York:

Henry C. Roberts and Archibald S. Clarke, defendants in the above action, hereby petition your honor to allow a writ of error to issue to the Supreme Court of the United States to reverse a certain judgment entered in this court June 3rd, 1884, in favor of the plaintiff and against the defendants, for $6,855.90, and they say that in the record and proceedings there is manifest error, in this, to wit, that the court erroneously held that the contract upon which the action was brought was valid, whereas in truth the same was void for uncertainty.

That the court erroneously held there was a breach of the said contract.

That the court erroneously disallowed the defendants the sum of $1,926.27 due them from the plaintiff for coal sold and delivered and wrongfully retained by the plaintiff.

That the court erroneously allowed a recovery on four hundred tons of iron, whereas, if any recovery was allowed, it should not have been on more than two hundred fifty tons of iron.

93 That the court erroneously held that the plaintiff could recover from damages on the basis of the market price for November, 1879, whereas any recovery could only be based on the market price in September, 1879, or prior thereto.

That the court erroneously allowed improper evidence for the plaintiff and refused to receive proper evidence for the defendants.

That the court erroneously allowed judgment for the plaintiff and against the defendants, as appears by the record aforesaid, whereas by the law of the land the said judgment should have been in favor of the defendants and against the plaintiff.

Wherefore they pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of said judgment, &c.

JAMES BRECK PERKINS,
Attorney for Plaintiffs in Error.

(Indorsed:) Benjamin *vs.* Roberts. Petition. Filed Jun- 20, 1884. Wm. S. Doolittle, clerk. Writ of error allowed; bond to be given in penalty of $10,000. June 16th, 1884. Wm. J. Wallace.

94 Know all men by these presents that we, Julia E. Roberts and George B. Smith, of Rochester, New York, are held and firmly bound unto Henry M. Benjamin, of Milwaukee, Wisconsin, in the sum of ten thousand dollars, to be paid to the said Benjamin,

or his certain attorney, executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of June, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas, lately at a session of the circuit court of the United States for the northern district of New York, in a suit pending in said court between Henry M. Benjamin, plaintiff, and Henry C. Roberts and Archibald S. Clarke, defendants, a final judgment was rendered against the said defendants, and the said defendants being about to prosecute a writ of error from the said circuit court to the Supreme Court of the United States:

Now, the condition of this obligation is such that if the said Henry C. Roberts and Archibald S. Clarke shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the obligation shall be void; else to remain in full force and virtue.

JULIA E. ROBERTS. [SEAL.]
GEO. B. SMITH. [SEAL.]

95 STATE OF NEW YORK, } *ss:*
City of Rochester, County of Monroe, }

On this 12th day of June, 1884, before me personally appeared Julia E. Roberts and George B. Smith, to me known to be the same persons described in and who executed the above instrument, and severally acknowledged that they executed the same.

JOSEPH S. HUNN,
Notary Public in & for Monroe Co., N. Y.

STATE OF NEW YORK, } *ss:*
City of Rochester, County of Monroe, }

George B. Smith, being duly sworn, says he is a resident and freeholder of the county of Monroe and State of New York; that he is worth in property not exempt from levy and sale on execution the sum of twenty thousand dollars over and above all debts and liabilities which he owes or has incurred.

GEO. B. SMITH.

Sworn to before me June 12th, 1884.
[L. S.]
JOSEPH S. HUNN,
Notary Public in and for Monroe Co., N. Y.

STATE OF NEW YORK, } *ss:*
City of Rochester, County of Monroe, }

Julia E. Roberts, being duly sworn, says she is a resident and freeholder of the county of Monroe and State of New York;
96 that she is worth in property not exempt from levy and sale on execution the sum of twenty thousand dollars over and above all debts and liabilities which she owes or has incurred.

JULIA E. ROBERTS.

Sworn to before me June 12th, 1884.

[L. S.] JOSEPH S. HUNN,
Notary Public in & for Monroe Co., N. Y.

(Indorsed:) Law. 2409. Benjamin *vs.* Roberts. Bond. Filed Jun- 20, 1884. Wm. S. Doolittle, clerk.

Within bond approved June 16th, 1884, subject to justification of sureties if required.

WM. J. WALLACE.

97 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Henry M. Benjamin, plaintiff, and Henry C. Roberts and Archibald S. Clarke, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the

98 record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 16th day of June, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE, *Clerk.*

Allowed by—
WM. J. WALLACE,
Circuit Judge.

99 THE UNITED STATES OF AMERICA:

To Henry M. Benjamin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein Henry C. Roberts and Archibald S. Clarke are plaintiffs in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should

or his certain attorney, executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of June, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas, lately at a session of the circuit court of the United States for the northern district of New York, in a suit pending in said court between Henry M. Benjamin, plaintiff, and Henry C. Roberts and Archibald S. Clarke, defendants, a final judgment was rendered against the said defendants, and the said defendants being about to prosecute a writ of error from the said circuit court to the Supreme Court of the United States:

Now, the condition of this obligation is such that if the said Henry C. Roberts and Archibald S. Clarke shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the obligation shall be void; else to remain in full force and virtue.

JULIA E. ROBERTS. [SEAL.]
GEO. B. SMITH. [SEAL.]

95 STATE OF NEW YORK, } ss:
City of Rochester, County of Monroe, }

On this 12th day of June, 1884, before me personally appeared Julia E. Roberts and George B. Smith, to me known to be the same persons described in and who executed the above instrument, and severally acknowledged that they executed the same.

JOSEPH S. HUNN,
Notary Public in & for Monroe Co., N. Y.

STATE OF NEW YORK, } ss:
City of Rochester, County of Monroe, }

George B. Smith, being duly sworn, says he is a resident and freeholder of the county of Monroe and State of New York; that he is worth in property not exempt from levy and sale on execution the sum of twenty thousand dollars over and above all debts and liabilities which he owes or has incurred.

GEO. B. SMITH.

Sworn to before me June 12th, 1884.
[L. S.] JOSEPH S. HUNN,
Notary Public in and for Monroe Co., N. Y.

STATE OF NEW YORK, } ss:
City of Rochester, County of Monroe, }

Julia E. Roberts, being duly sworn, says she is a resident and freeholder of the county of Monroe and State of New York;
96 that she is worth in property not exempt from levy and sale on execution the sum of twenty thousand dollars over and above all debts and liabilities which she owes or has incurred.

JULIA E. ROBERTS.

Sworn to before me June 12th, 1884.

[L. S.] JOSEPH S. HUNN,
Notary Public in & for Monroe Co., N. Y.

(Indorsed:) Law. 2409. Benjamin *vs.* Roberts. Bond. Filed Jun- 20, 1884. Wm. S. Doolittle, clerk.

Within bond approved June 16th, 1884, subject to justification of sureties if required.

WM. J. WALLACE.

97 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Henry M. Benjamin, plaintiff, and Henry C. Roberts and Archibald S. Clarke, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the
98 record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 16th day of June, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE, *Clerk.*

Allowed by—
WM. J. WALLACE,
Circuit Judge.

99 THE UNITED STATES OF AMERICA:

To Henry M. Benjamin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein Henry C. Roberts and Archibald S. Clarke are plaintiffs in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should

not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William J. Wallace, judge of the circuit court for the northern district of New York, this 16th day of
100 June, 1884.

WM. J. WALLACE.

[Endorsed:] 2409. Due service of the within citation is hereby admitted this 23rd day of June, 1884. H. M. Benjamin, by Hale & Bulkley, his att'ys.

101 UNITED STATES OF AMERICA, } ss:
Northern District of New York, }

I, William S. Doolittle, clerk of the circuit court of the United States of America for the northern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 101, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Henry M. Benjamin against Henry C. Roberts and Archibald S. Clark as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Utica, in the northern district of New York, in the second circuit, this 28th day of August, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the said United States the one hundred and ninth.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE, *Clerk.*

102 United States Supreme Court.

HENRY C. ROBERTS and ARCHIBALD S. CLARKE, Plaintiffs in Error,
vs.
HENRY M. BENJAMIN, Defendant in Error.

And now come the plaintiffs in error, by J. B. Perkins, their attorney, and say that in the record of the proceedings herein there is manifest error, in this, to wit:

That the court below erroneously held that the contract upon which the action was brought was valid, whereas in truth the same was void for uncertainty.

That the court erroneously held there was a breach of the said contract.

That the court erroneously disallowed the defendants the
103 sum of $1,926.27, due them from the plaintiff for coal sold and delivered, and wrongfully retained by the plaintiff.

That the court erroneously allowed a recovery on four hundred tons of iron, whereas if any recovery was allowed it should not have been on more than two hundred fifty tons of iron.

That the court erroneously held that the plaintiff could recover for damages on the basis of the market price for November, 1879, whereas any recovery could only be based on the market price in September, 1879, or prior thereto.

That the court erroneously allowed improper evidence for the plaintiff and refused to receive proper evidence for the defendants.

That the court erroneously allowed judgment for the plaintiff and against the defendants, as appears by the record aforesaid,
104 whereas by the law of the land the said judgment should have been in favor of the defendants and against the plaintiff.

Wherefore they pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of said judgment, &c.

JAMES BRECK PERKINS,
Attorney for Plaintiffs in Error.

105 [Endorsed:] U. S. Supreme Court. Henry C. Roberts *et al.*, pl'ffs in error, *vs.* Henry M. Benjamin, def't in error. Assignment of error. James Breck Perkins, att'y for pl'ffs in error.

[Endorsed:] Supreme Court U. S., 1884, October term. No. 1106. Henry C. Roberts *et al.*, pl'ffs in error, *vs.* Henry M. Benjamin. Assignment of error.

[Stamped:] Office Supreme Court U.S. Filed Oct. 20, 1884. James H. McKenney, clerk.

106 *Joinder in Error.*

Supreme Court of the United States.

HENRY M. BENJAMIN, Defendant in Error,
against
HENRY C. ROBERTS and ARCHIBALD S. CLARKE, Plaintiffs in Error.

And afterwards, to wit, on the second Monday of October, in the year, 1884, the said defendant is error, by Matthew Hale, his attorney, freely comes into court and says that there is no error in the record or proceedings aforesaid, or in the giving of judgment aforesaid, and he prays that the said Supreme Court of judicature, before the justice thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed.

MATTHEW HALE,
Attorney for Defendant in Error.

107 [Endorsed:] Supreme Court of the United States. Henry M. Benjamin, defendant in error, against Henry C. Roberts and Archibald S. Clarke, plaintiffs in error. Joinder in error. Matthew Hale, att'y for def't in error, 25 North Pearl street, Albany, N. Y.

[Endorsed:] Supreme Court U. S., 1884, October term. No. 1106. Henry C. Roberts *et at.*, pl'ffs in err-, *vs.* Henry M. Benjamin. Joinder in error.

[Stamped:] Office Supreme Court U. S. Fil d Oct. 27, 1884. James H. McKenney, clerk.

Endorsed on cover: N. New York C. C. U. S. No. 120. Henry C. Roberts and Archibald S. Clarke, plaintiffs in error, *vs.* Henry M. Benjamin. Filed 17th October, 1884.

124-64

Supreme Court of the United States,

OCTOBER TERM, 1887.

Number 120.

HENRY C. ROBERTS & ARCHIBALD S. CLARKE.

Plaintiffs in Error,

against

HENRY M. BENJAMIN,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Brief for Plaintiffs in Error.

SUPREME COURT

OF THE UNITED STATES,

October Term, 1887. No. 120.

HENRY C. ROBERTS AND ARCHIBALD S. CLARKE,

Plaintiffs in Error,

vs.

HENRY M. BENJAMIN,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

This case comes here on a writ of error to the Circuit Court of the United States for the Northern District of New York.

The plaintiffs in error were defendants in the action below. The action was brought by the defendant in error for the breach of an alleged contract for the delivery of iron.

The defendants below claimed that no valid contract was made, and that if any was made, they were excused, by reason of certain acts of the plaintiff, from performance. They also put in a counter-claim, and a serious question arose as to the measure of damages in case the defendants were held liable.

The case was referred to Ward Hunt, Jr., who held that the damages to which the plaintiff was entitled were the sum of $5,800, with interest from November 7, 1879. He allowed $773 of the counter-claim, and disallowed the balance. Judgment was entered in favor of the plaintiff for $6,855 (*fol. 31*). A motion for a new trial was made before the Circuit judge, and denied (*fol. 91*).

From the judgment thereupon entered the defendants sued out a writ of error (*fols. 92-107*).

FACTS OF THE CASE.

The defendants below were dealers in coal and manufacturers of iron at Charlotte, N. Y. The plaintiff was a jobber in coal and iron at Milwaukee. On July 1, 1879, he owed them $625 for coal and $117 for iron. (*Findings, fol. 25*). He had purchased coal of them in 1876 and 1878, upon which he had claimed shortages, which had been allowed by the defendants, who believed them to be correct, to the amount of $1,926.73 (*fols. 68, 80, 82*).

On July 17, 1879, Benjamin sent the defendants a telegram asking their lowest prices for 400 tons, number 2 and 400 tons number 1 iron, or one cargo of each, delivered afloat at Milwaukee.

On July 19th he telegraphed again "Please answer my telegram; customer waiting for answer." On July 23, the defendants answered that they would deliver a cargo of number one iron at $19.50, and would ship it about the first of September. On July 25, Benjamin accepted this offer (*fols. 2, 3, 4*). The iron was to be shipped by boat from Charlotte to Milwaukee by the Welland Canal, and the usual time for the trip was ten days (*fol. 55*).

The size of a cargo of iron going by this route varied from 250 to 600 tons (*fols. 33, 38, 48*). The defend-

ants manufactured over 500 tons by September 1, but they did not deliver any to the plaintiff (*fols. 44, 49*).

On August 15, they notified him of the amounts he owed them for iron and coal, and said they wished these old matters straightened up at once. (*Ex. 3, fol. 72*). To this he answered that he wanted his iron at once, and he would endeavor to settle the balance when he came east. (*Ex. 4*).

On September 3, Benjamin wrote asking for the immediate shipment of the iron, saying that he had sold it all. (*Ex. 7, fol. 74*). He promised in this letter to send a settlement of the old iron account in a few days. Shortly after this, and in the early part of September, Benjamin came to Rochester for the purpose of geting the iron. The defendants refused to deliver it unless Benjamin paid the full amount of the claims they made against him. He refused to do this, and made a demand upon them for the iron, claiming a cargo of 500 tons. This was refused (*fol. 67*).

The defendants did nothing more, except that in answer to further letters from the plaintiff, they wrote him, October 22, saying that they would not compromise the matter, and that they would ship no iron unless they received pay for the amount claimed to be due them, including the shortage, of $1,926.00, which had been improperly charged against them by Benjamin. They also wrote to the same effect November 7th (*fol. 78*). Benjamin did not accede to this demand, but stood on his position taken in September.

In the meantime there had arisen an extraordinary speculation in iron In August it sold at $19 per ton at Charlotte and $20 and $22 at Chicago and Milwaukee (*fols. 40, 48*). In September it varied from $22 to $23 (*fol. 48*). During the first half of September it rose to $24 in Chicago (*fol. 40*). During the latter part of the month the rise in iron became still sharper (*fol. 36*). Prices continued capricious and uncertain (*fol. 41*), and

fluctuated wildly. By November the price at Chicago and Milwaukee had reached $34 per ton. By the next April the price had again fallen some $10 a ton (*fol. 38*), and it fell to nearly the price that had obtained in the summer of 1879. The defendants claimed that if their position that they were not bound to ship the iron unless Benjamin paid them what he owed them was not well taken, then there was a breach of contract shortly after the first of September, when Benjamin made his demand, and it was refused (*fol. 67*). At that time the market price of iron at Chicago and Milwaukee was from $22 to $24. (*fol. 40*). The referee, however, took the 7th of November, when the defendant's last letter was written, as the time of the breach. Iron had advanced $10 a ton and by adopting this date, the plaintiff recovered $4,000 more than he otherwise would have, and made a large speculative profit.

The referee also held, that the defendants were concluded as to the shortages of coal, and were not entitled to their counter claim of $1,926 (*fol. 24, 25*).

ASSIGNMENT OF ERRORS.

The Court erred:

First.—In that it held the contract on which the action was brought to be valid, whereas the same was void for uncertainty.

Second.—In that it disallowed the defendants the sum of $1,926 due them from the plaintiff for coal sold and delivered, and wrongfully retained by the plaintiff.

Third.—In that it allowed damages on 400 tons of iron, whereas, if any recovery was allowed, it should have been on only 250 tons of iron.

Fourth.—In that it erroneously held that there was any breach of the contract.

Fifth.—In that it took for the measure of damages the market price of iron in November, 1879, whereas, it should have taken the market price in September, 1879, when the breach of the contract occured.

Sixth.—In that it received improper evidence for the plaintiff as to what would be understood by, or expected from a "cargo," and refused to receive proper evidence for the defendants as to the weights of coal. (*See Sixth Point.*)

POINTS.

First.

The contract was void for uncertainty.

The minds of the parties never met on the amount of the iron to be sold.

The contract is found in plaintiff's letter of July 25, 1879, answering defendants' letter and telegram (*fol. 4*).

"I accept your offer for one cargo No. 1 @ $19.50 afloat at Milwaukee."

There is nowhere in the correspondence any statement of any boat whose cargo was to be sent, nor is there, as in some of the cases, the phrase "one cargo, about so many tons." It is simply "a cargo."

The evidence in the case shows that the term "cargo" means nothing unless some amount be specified. The plaintiff's witness says (*fol 37*): "Well, usually when we order a cargo of iron we specify how much we want"

The contract for a cargo simply would have been filled by the cargo of any vessel going through the Welland canal and used for carrying

iron, but the size of cargoes ranged, as the evidence shows, from 250 to 550 or 600 tons. Benjamin says 450 to 550 net tons. Elmore says 400 to 500. Brown says, 450 to 600. Hopkins says, 250 to 325. Roberts says 300 (*fols. 33, 5, 8, 48, 52*). These are net tons, and iron is sold by gross tons, and on account of its weight, boats cannot carry as much as of coal (*fols. 33, 48*).

If the contract was valid, certainly the delivery of a cargo of a boat which could only carry 250 tons would have been a performance. But if it was valid, then also a cargo of 600 tons could have been shipped, and the plaintiff would have been bound to accept it. This cannot be, and it shows that the contract was void because there was no agreement as to amount. Could the plaintiff be in a position where, if iron went up, he must be content with a cargo of 250 tons; if it went down, he was bound to receive a cargo of 600 tons? Yet such was his position if a valid contract was made. That contract was contained in the telegrams and letters set out in the complaint (*fols. 3, 5*). There is nothing in them that fixes the size of the cargo. Unless a valid contract was then made, no contract was made. Can it be disputed that if it was a valid contract the defendants could, on September 1, and before any further negotiations, have shipped a cargo carrying 250 tons, or one carrying 600 tons, and that either would have satisfied the contract. But if that is so, then there was no contract.

Many cases can be found of contracts where the term cargo was used, but always it was the cargo of a particular vessel or a cargo of about some specified size.

Pembroke Iron Co. v. Parsons, 5 Gray, 589.
Morris v. Levison, 1 C. P. Div. 155.
Clark v. Baker, 5 Metcalf, 452.

The statements of the courts in these cases that the size of the cargo was regulated either by the boat named, or by the amount prescribed in the order, show that the term "cargo," referring to no boat and no amount, is uncertain and void, because fixing no quantity.

Nor is there anything to sustain the referee's finding that the term cargo was understood by the plaintiff and the defendants to mean a cargo of four hundred tons This finding is purely imaginary

Certainly the plaintiff did not understand 400 tons He sued, claiming 500 tons. After the contract was made, and in September, he claimed 500 tons (*fols. 67, 77*).

Nor does the defendant's letter (*fol. 78*) affect the case—that was their offer to compromise.

They say they will deliver 400 tons as the amount of the cargo. This very statement shows that the amount had not been fixed by the contract.

Benjamin says (*fol. 67*) that the defendants did not come to any settlement or agreement about the amount to be delivered. The trouble with the learned referee was he made an agreement for the parties when their own minds never met on one.

And this answers the position of the plaintiff's counsel that the contract was admitted by the answer. There is no contract unless the minds of the parties meet. The plaintiff says he understood the term cargo to mean 500 tons (*fol. 5*). The defendants say that they understood it to mean not over 400 tons (*fol. 7*). In other words, they didn't understand the same thing, and there was no valid contract.

Second.

The amount on which any recovery could be had was only 250 tons, and the referee erred in allowing damages on 400 tons.

This follows as a result of the facts stated in the first point, assuming that notwithstanding these the court should hold that there was a valid contract.

It appears that 250 tons was a full cargo of iron (gross tons) on some boats going from Charlotte to Milwaukee, and that the defendants had shipped cargoes of that size for 11 years (*fol. 48*).

But, as said before, if this contract was valid at all, it was for the cargo of any boat sailing between Charlotte and Milwaukee, and it could be filled by sending the cargo of any such boat. No further liability can now be imposed than was required to fill the contract.

Third.

The referee erred in taking the market price of iron in November as the measure of damages, instead of the market price in September, when the iron was to be delivered and when the breach of the contract occurred.

The iron was to be shipped as soon as manufactured, and about the 1st of September. (*See letters of July 23 and 28, fols. 3 and 4*)

The defendants manufactured sufficient iron to fill the order by the early part of September. (*See Ex. 3, fols. 72, 49, 44, 36*). It would have

taken ten days to deliver in Milwaukee by water. The defendants refused to deliver the iron unless Benjamin would make them certain payments, which he refused to make, and as a matter of fact, they did not deliver the iron in conformity with the contract. The plaintiff made a formal demand of the iron. (*Exs. 7 and 8*). In *Ex. 10, fol. 75*, written September 13, the plaintiff says: "I have already suffered by its not being delivered, as agreed." Immediately after that he came to Rochester and made a demand upon the defendants for the iron (*fol. 67*). It was not delivered, and if there was a valid contract, the breach of it then occurred. Benjamin could have brought this action at once, and if he is entitled to a recovery now, he would have been entitled to a recovery then. There was no extension of the time of performance, nor did the defendants request any extension.

The rule of damages for the breach of a contract is, of course, very familiar. It is the difference between the contract price and the market price at the time and place of delivery, and not at any subsequent period.

Shepherd vs. Hampton, 3 Wheaton, 200.
Hadley vs. Baxendale, 9 Exch., 241.
Messmore vs. Shot Co., 40 N. Y., 422.
McHose vs. Fulmer, 73 Pa. St., 365.

The rule is stated in the head-note of the case in Wheaton: "In an action by the vendee for a breach of contract of sale by the vendor in not delivering the article, the measure of damages is the price of the article at the time of the breach of contract, and not at any subsequent period."

The referee in this case, however, did not take the price of iron in September, when the breach occurred, but the price on November 7th. This error is specially important, because in the mean-

Second.

The amount on which any recovery could be had was only 250 tons, and the referee erred in allowing damages on 400 tons.

This follows as a result of the facts stated in the first point, assuming that notwithstanding these the court should hold that there was a valid contract.

It appears that 250 tons was a full cargo of iron (gross tons) on some boats going from Charlotte to Milwaukee, and that the defendants had shipped cargoes of that size for 11 years (*fol. 48*).

But, as said before, if this contract was valid at all, it was for the cargo of any boat sailing between Charlotte and Milwaukee, and it could be filled by sending the cargo of any such boat. No further liability can now be imposed than was required to fill the contract.

Third.

The referee erred in taking the market price of iron in November as the measure of damages, instead of the market price in September, when the iron was to be delivered and when the breach of the contract occurred.

The iron was to be shipped as soon as manufactured, and about the 1st of September. (*See letters of July 23 and 28, fols. 3 and 4*)

The defendants manufactured sufficient iron to fill the order by the early part of September. (*See Ex. 3, fols. 72, 49, 44, 36*). It would have

taken ten days to deliver in Milwaukee by water. The defendants refused to deliver the iron unless Benjamim would make them certain payments, which he refused to make, and as a matter of fact, they did not deliver the iron in conformity with the contract. The plaintiff made a formal demand of the iron. (*Exs. 7 and 8*). In *Ex. 10, fol. 75*, written September 13, the plaintiff says: "I have already suffered by its not being delivered, as agreed." Immediately after that he came to Rochester and made a demand upon the defendants for the iron (*fol. 67*). It was not delivered, and if there was a valid contract, the breach of it then occurred. Benjamin could have brought this action at once, and if he is entitled to a recovery now, he would have been entitled to a recovery then. There was no extension of the time of performance, nor did the defendants request any extension.

The rule of damages for the breach of a contract is, of course, very familiar. It is the difference between the contract price and the market price at the time and place of delivery, and not at any subsequent period.

Shepherd vs. Hampton, 3 Wheaton, 200.
Hadley vs. Baxendale, 9 Exch., 241.
Messmore vs. Shot Co., 40 N. Y., 422.
McHose vs. Fulmer, 73 Pa. St., 365.

The rule is stated in the head-note of the case in Wheaton: "In an action by the vendee for a breach of contract of sale by the vendor in not delivering the article, the measure of damages is the price of the article at the time of the breach of contract, and not at any subsequent period."

The referee in this case, however, did not take the price of iron in September, when the breach occurred, but the price on November 7th. This error is specially important, because in the mean-

time the wildest speculation in iron ever known in this or any other country had taken place. The price of iron on the 1st of September was $19.50. Two months thereafter it had advanced to $34, or over 75 per cent. Even at the time the breach occured the damages would have been $5.00 a ton, or $2,000 on 400 tons, and the plaintiff would have made a very handsome profit. But, by taking a later date in this crazy speculation, the plaintiff was allowed a speculative profit of $5,800. It is unnecessary to say that he would have made no such profit if the iron had been delivered. He claimed to have orders for this iron (*fols. 34, 74*), and he states that after September 1st, he bought iron from other parties and delivered it to his customers for the iron ordered from the defendants (*fol. 34*). If he suffered any damage, that was the amount of it. He declined to give the price for which he purchased in September (*fol. 34*), and it is fair to assume that he paid little more than that fixed in the contract with the defendants.

But, taking the price in November, gave the plaintiff a profit of 75 per cent., which he certainly would not have made if the iron had been delivered to him. Such a recovery is not indemnity, but speculation. It is just such a recovery as is condemned by the New York Court of Appeals in *Baker vs. Drake, 53 N. Y., 211*, and in many analogous cases. It is supposing that the plaintiff would have profited by wild speculation, and with infinite wisdom would have waited until he could unload his goods at an enormous profit. The very considerable rise by the early part of September would have yielded an unusual profit, and all the plaintiff would have made had the contract been fulfilled. He cannot ask to be put in any better position.

The referee in this case seemed to think that the execution of the contract was postponed; but there was nothing of the sort. The defendants were bound to ship the iron by September 1st, and they did not do it. The plaintiff could have brought his action immediately thereafter and had a recovery. He could have sued in September, and it would not be claimed that his recovery could be for any more than the price of iron when he brought his suit. The breach had occurred and the right to damages had accrued. If the price of iron had gone down, the plaintiff would not have been obliged to take the price in November, instead of the price in September. After the defendant's refusal to deliver in September, they could not have obliged Benjamin to accept the iron, had it fallen in value. But they could not remain liable to an increasing liability on a contract by which the plaintiff was no longer bound. It cannot be the law, that by delaying a few months, and then suing for the same breach, the plaintiff is entitled to recover a different measure of damages.

He could not be in a position where, if iron fell in price from September to November, his damage would not be diminished but if rose in price, his damages would be increased

The plaintiff may have hoped to get this iron after the defendants' refusal to deliver; but nothing that they said furnished him any foundation for his hopes.

In the cases which the plaintiff cites there was, as will be shown hereafter, some extension of the time of performance, or some request by the defendants for delay, in which the plaintiff acquiesced. But there was nothing of the sort here. The defendants refused to deliver except upon condi-

tions which the referee held they had no right to exact. In this refusal they were persistent. They never asked for any more time, and the plaintiff never gave them any more time.

The plaintiff made his formal demand early in September (*fol. 67*), and was refused, and he had his right of action then. The only letters the defendants sent after that interview simply persisted in this refusal. Benjamin wrote them October 4th (*fol. 77*). They sent no answer. He wrote again October 14. (*Ex. 12, fol. 77.*) To this the defendants replied on October 22nd, (*Ex. 12 1-2*), "Your letter received. Mr. Roberts is absent. When he went away he left word that no compromise was to be made in this matter, as you fully understood what was due us. We will not entertain any arrangement for shipment of either iron or coal until we have pay from you for our weights as billed."

The plaintiff, at no time, acquiesced in this position of the defendants, and the referee decided that the defendants had no right to impose it (*fols. 22, 25*). The payment of weights, as billed, involved the payments of the shortages which Benjamin charged, and amounted to $2,723.72 (*fol. 79*). On the 7th of November the defendants wrote enclosing this bill, and saying that if this bill was paid they would then, not indeed perform the contract made in August, but deliver a certain amount of iron at a dollar a ton above the August price (*fol. 78*).

Why the referee should regard this letter as the final breach of the contract I am unable to see. There is not one iota of evidence in the case of any extension of time for delivery, or of any request on the part of the defendants for such an extension. It is, certainly, an extraordin-

ary position to claim, that when a defendant refuses to perform his contract at the time of performance, unless upon a condition to which he is not entitled, that by re-stating his position, subsequent to the breach, he changes the rule of damages.

The cases cited by the plaintiff lay down no such rule.

In the case of

Ogle vs. Earl Vane, L. R., 3 Q B., 272,

it appeared that the defendant's mill, in which the iron was to be manufactured, was burned. The defendant did not in any way refuse to perform, but he asked for three months time to be allowed him in which he might make his repairs.

The plaintiff acquiesced in this demand and waited the three months. After the three months had expired the defendant did not furnish the iron. Willes, J., says: "There was a contract to purchase forbearance. There was evidence that the plaintiff did consent to forbear." And the learned judge further said that there was evidence for the jury that what had passed between the parties amounted to an agreement.

In other words, in that case the defendant had not refused to perform, but had asked for more time for his own benefit. There had been, if not an express, at least a tacit consent to such an arrangement. There had been, as one of the Court said, circumstances which would authorize the jury in finding an arrangement for the extension of time. Undoubtedly the defendant could not ask for an extension and obtain the plaintiff to acquiesce in this, and then when he finally broke the contract, say that the measure of damages should not be the price at the delayed time of performance, for which he had himself asked.

In

Hill vs. Smith, 34 Vermont., 535,

there was an agreement to enlarge the time for the performance of the contract, and the jury were charged that there could be no recovery unless they found such an agreement. The case of *Hickman vs. Haynes, L. R. 10C. P., 598,* which was cited below, arose on altogether different facts, and does not bear on the questions to be discussed here.

In

Ex parte Llansamlet Tin Plate Co, 16 Equity, 155,

the case of *Ogle vs. Vane* was discussed and explained.

In the case in *16th Equity* the defendant had failed to deliver iron at the time specified in his contract. After the time for delivery, the plaintiff kept asking for iron, and the defendant made some offer of part fulfillment. The plaintiff forebore bringing any action and acquiesced in the delay until the defendant failed. The claim for damages was then presented, and it was held that the measure of damages was the price of the iron when it was to be delivered under the contract. There had been a rise in the value during the negotiations, but the Court refused to allow this. The *Ogle* case was discussed but held not to be applicable, because in the *Tin Co.* case there was no request for forbearance by the vendor. It appeared, also, in that case, as it appears in the action here, that the plaintiff had bought iron in the market. The Court says: "That there was forbearance on the part of the purchasers is clear on the evidence. * * * It is said on behalf of the trustee that the forbearance was simply an omission to insist upon the delivery; that

it was very convenient, no doubt, to Mr. Voss (the defendant) that the delivery should not take place because he was engaged in carrying out some more lucrative business; but that there was no other forbearance than that I think that is proved by the facts of the case." An appeal was taken to the Lords Justices, where the judgment was affirmed, and James, L. J., held that there was no evidence of forbearance on the part of the purchaser at the request of the vendor.

It is submitted that this case is a precise authority for the plaintiffs in error. Here, also, the defendants below requested no forbearance. They simply refused to perform, except upon conditions to which they were not entitled. Here, also, it appears by Benjamin's evidence that when the defendants did not deliver in September he went into the market and bought iron (*fol. 34*), a fact to which great attention is given in the case in the *16'h Equity*.

The rule thus established in England is the rule in this country. The case of

Norton vs. Wales, 1 Robertson, 561,

lays down the rule which exists in the State of New York, as follows: "Whether the contract either fixes a day for the delivery or allows a reasonable time, delay in delivery, made at the seller's request, but without any valid agreement for delay which would preclude the purchaser from bringing an action immediately, does not extend the time, so that an advance in the market price meanwhile can be considered in computing damages."

In that case naphtha was to be delivered in August, but it was not delivered. The plaintiffs proved that several times prior to the middle of November they requested the

defendants to deliver, and the latter in reply said: "The articles will be along immediately." "Will come right along." In the middle of November, a final demand was made, and the defendants said that if the plaintiffs would wait until the following Monday it would all be made right with them.

The naphtha was not delivered, and the plaintiffs below were allowed to recover on the basis of the market price in November. This was reversed, and the Court held that the measure of damages must be the price in August, stating the rule as above cited.

This case is, in all respects, the same as the one before this Court. It fixes the law in the State of New York, where the contract now before the Court was made. If the law of the place of this contract is to govern, this case shows that the referee erred. Numerous cases in New York lay down the same rule.

In

Hewitt vs. Miller, 61 Barb., 567,

a similar question arose, and *Norton vs. Wales* was followed. The case of *Ogle vs. Earl Vane* is referred to in the opinion of the Court, and the Court says: "In that case there was evidence that the defendants requested delay for their benefit to enable them to substitute other iron in place of that which they had contracted to deliver, but could not, and the plaintiffs acquiesced in the request. It was a clear extension of the time of performance."

Norton vs. Wales is also cited and approved in *Currie vs. White, 37 How., 362.*

It is, perhaps, proper to say that these New York cases were not brought to the attention of the

Court below; and while no opinion is written, it is fair to assume that the case of *Ogle vs. Earl Vane*, which was not critically examined on the argument, was supposed to be controlling.

The same rule that exists in New York is laid down in the Illinois case of

Sleuter vs. Wallbaum, 45 Ill., 43,

and it is, indeed, the general common law rule for the measure of damages in the case of a breach, which is recognized by this Court in the case in the *3d of Wheaton*, cited above.

The same result is reached by allowing the plaintiff what he would have made on his contract for re-sale.

Benjamin notified the defendants, at the time of asking for this iron, that it was for customers waiting for an answer, (*Ex. 25, fol. 87*), and in his letter of September 3, (*Ex. 7, fol. 73*), that his customers were then entitled to the iron, and it was promised to them early in September. And at *fol. 34* he says that he delivered iron to these customers, and bought it from other parties after September 1. It appears by uncontradicted evidence that iron could be bought to fill this contract during nearly the whole of the month of September, at from $21 to $24.

Such, therefore, would be the measure of damages if the parties were supposed to contemplate the profits on the sub-contract as the measure of damages at the time of making the contract.

Messmore vs. Shot Co., 40 N. Y., 424.

Fourth.

The Referee erred in refusing to open the account between the parties, and to allow the defendants' claim for $1,926.77, wrongfully charged them by the plaintiff for shortages on coal, which had no existence.

The referee does not find that the plaintiff's weights were right or the defendants' wrong. He only finds that the plaintiff s claims for shortages having been allowed, cannot now be re-opened, and he declined to find which weights were correct. In this view the referee did not follow the cases cited below, and fell into error.

The evidence showed clearly that the defendants' weights were right and the plaintiff's wrong.

The defendants' weights were made at the mines and in large quantities. The plaintiff's were made by barrel loads and by an ignorant and drunken weigher, with incompetent assistants, who could only hope to retain the business of such a customer as Benjamin by having frequent shortages (*fols. 52, 61, 66*).

It is curious that the one time the defendants insisted on a board of trade weigher, the cargo overran. Even then Benjamin endeavored to escape paying for what he got (*fols. 43, 65, 85–7*).

The correspondence at this time about the iron and coal shows Benjamin's persistent endeavors to get the better of the defendants. (*Exs. 18–24.*)

The evidence proving that the defendants' weights were right, and that an equally accurate weighing at Milwaukee would have shown no shortage, will be found at *fols. 43–6, 50, 52, 56–7.*

The inaccuracy of plaintiff's system of weighing will be found at *fols. 52, 56–7.* Also see evidence of the board of trade weigher at Milwaukee as to Croissant and his assistants (*fol. 66*). He discharged Croissant for drunkenness and incompetency.

There had, at most, been accounts stated between the parties.

Such an account can always be opened for fraud or mistake.

Champion vs. Joslyn, 44 N. Y., 653.

It is there stated, per Hunt, C., that though the balance claimed had been actually paid, the account could be impeached or corrected.

Hutchinson vs. B'k of Troy, 48 Barb., 302.

There the corrections were not sought to be made until six years afterwards, but it was held the account could be opened for fraud or mistake.

Manhattan Co. vs. Lydig, 4 Johns., 377.
Philips vs. Belden, 2 Edw. Ch., 1.
Anthony vs. Day, 52 How. Pr., 35.

If Benjamin knew or suspected that his weighers did not get the weights right, then it was a fraud on his part. If he did not, then both plaintiff and defendants were mistaken in supposing the charges for shortages right. In either case the amount due can now be recovered.

There is no element of estoppel. There is no reason why Benjamin should not pay what he owes.

All the effect there could be in these accounts being rendered and allowed, is to throw on the defendants the burden of proof of showing that

their weights were right and the claims for shortage erroneous.

Hutchinson vs. B'k of Troy, 48 Barb., 302.

The referee was bound to pass upon the question of fact whether these charges for shortages were right or wrong. He erred in holding that the defendants were concluded from opening the settlement they had made (*fol. 25*).

Fifth.

The defendants were justified in their refusal to deliver the iron.

The referee has found that Benjamin owed them over $700 for coal and iron which they had sold him (*fols. 23, 24, 25*). This indebtedness he did not pay. On the other hand, he avoided the question of payment, neither agreeing nor refusing, but postponing. (Letter of August 19, *Ex. 4, fol. 72;* letter of Sept. 3, *Ex. 7, fol. 73*), in which he promises settlement of the iron account, which promise he never fulfilled. Letter of Sept. 13 (*Ex. 10, fol. 75*). In this he said he would be east and talk over the matters, and he would, no doubt, satisfactorily adjust them. It is a familiar rule that a party has a right to rescind a contract if the vendee has given the order not intending to pay for the goods.

Donaldson vs. Farnell, 93 N Y., 631, and cases cited.

What difference is there in principle if the order was made with the intent not to pay for some part of the goods? Benjamin was not insolvent, but he made deductions unjustly for shortages on all goods sent him and refused to

pay them. The defendants were not bound while those charges were unpaid to ship further goods from which the plaintiff would deduct further shortages.

The correspondence certainly shows that the plaintiff was avoiding the settlement of the bills, which on the trial he gave no evidence to show were wrong. Considering this, the defendants were justified in refusing to ship the iron, and in saying that Benjamin would not pay what he owed them.

Sixth.

Material errors were made in the reception and exclusion of evidence.

a. At *folio 36* the plaintiff below was allowed to ask this question, "What is usually understood by a cargo of iron?" The answer to this was, "When we speak of a cargo coming from Lake Ontario we expect to get from 475 to 550 tons." The defendants asked to have this answer stricken out.

At *folio 37* the plaintiff was allowed to ask, "What would be understood by a cargo if it were not specified as large or small?"

Exceptions were taken to the allowance of these questions. They were plainly incompetent.

The plaintiff had no right to ask a witness what he understood by a cargo. Nor was it competent to allow a witness to state what he would expect to get in a cargo coming from Lake Ontario.

This evidence operated to the defendants' prejudice. It was upon such evidence that the referee must have based his finding that the parties understood the term "cargo" to mean 400 tons, while the defendants' manager, Hopkins,

(*fol. 48*), testified that the defendants had shipped from Charlotte for eleven years, and sent out cargoes weighing only from 250 to 325 gross tons, because a vessel would not take as much iron as coal (*fol. 48*).

The recovery on a cargo of 400 tons was almost double what it would have been on 250 tons, and the error in allowing this amount to be fixed by the statements of witnesses as to what they understood by, or expected from, a cargo entitles the plaintiffs in error to a new trial.

b. It was competent to show, as the plaintiffs in error offered to show (*fol. 41*), that the cargoes of coal which they shipped to parties other than Benjamin weighed in the same manner as those sent him, were of the weights called for by the bills of lading.

If the referee had received evidence which would have established that, with all the cargoes of coal sent out by the plaintiffs in error, the weights, on re-weighing, corresponded with the bills of lading, it certainly would have been strong evidence that the shortages claimed by Benjamin did not occur; that his system of re-weighing was erroneous, and that the plaintiffs in error were entitled to their counter-claim of $1,926, which Benjamin had wrongfully charged to them for shortages.

Seventh.

The judgment should be reversed, and the record remitted to the Circuit Court for a new trial.

JAMES BRECK PERKINS.
For Plaintiffs in error.

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124-64

DEC 20
JAMES H. McKENNEY,
CLERK.

U. S. SUPREME COURT.

HENRY C. ROBERTS, ET. AL.,
Plaintiffs in Error,

vs.

HENRY M. BENJAMIN,
Defendant in Error.

No. 120.

ADDITIONAL MEMORANDUM FOR PLAINTIFFS IN ERROR.

The counsel for the defendant in error is wrong in supposing that I ask this Court to review questions of fact. I am well aware that it does not review them.

But in this case there was no disputed question of fact, except perhaps as to the weights of coal. The only questions that arise are questions of law.

The contract was in writing.

Its construction is a question of law.

United States vs. Hodge, 6 Howard 279.

If a referee makes findings of fact without any evidence to support them, this is error of law and reviewable by a Court that does not consider questions of fact.

Putnam vs. Hubbell, 42 N. Y., 106, 113.

See also on what are questions of law.

King vs. Ins. Co., 6 Cranch, 71.
Dows vs. Exchange Bank, 91 U. S., 618.

The defendant in error can not stand on the finding of the referee, even if supported by evidence.

In his fifth finding he says :

"The defendants did not deliver the iron, or any part of it, to the plaintiff on or about the time specified in the offer." Then the measure of damages was the price on or about September 1.

He then finds "They (the defendants) postponed the execution of the contract from time to time and finally insisted, &c."

This doesn't change the rule. He has found a breach in September. He finds nothing else which under *Ogle vs. Vane*, or any case, authorises his conclusion of law that the measure of damages was to be fixed by the market price on November 7. See my third point.

JAMES BRECK PERKINS,
For the Plaintiffs in Error.

124-64

United States Supreme Court.

OCTOBER TERM, 1887.

No. 120.

ARCHIBALD S. CLARKE, SURVIVOR OF HENRY C. ROBERTS,
Plaintiff in Error,

AGAINST

HENRY M. BENJAMIN.

BRIEF OF DEFENDANT IN ERROR.

MATTHEW HALE,
ESEK COWEN,
Of Counsel for Defendant in Error, Albany, N. Y.

United States Supreme Court.

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Of Counsel for Defendant in Error, Albany, N. Y.

UNITED STATES SUPREME COURT.

ARCHIBALD S. CLARKE, Survivor of HENRY C. ROBERTS,

Plaintiff in Error,

AGAINST

HENRY M. BENJAMIN.

BRIEF OF DEFENDANT IN ERROR.

This case comes before this court upon writ of error from the Circuit Court of the United States for the Northern District of New York.

The action was brought by Henry M. Benjamin against Henry C. Roberts and Archibald S. Clarke, partners in business under the firm name of H. C. Roberts & Co., to recover damages for the breach of a contract for the manufacture and sale of a cargo of iron. The original plaintiffs in error were citizens and residents, and did business as partners under the firm name of H. C. Roberts & Co., at Rochester in the State of New York. The defendant in error was a citizen of Wisconsin, residing and doing business at Milwaukee. The complaint may be found on pages 1, 2 and 3 of the printed record. An amendment to the complaint, which was made by stipulation, may be found on page 9, folio 17 of the record. The contract as set forth in the complaint was made by correspondence, and the letters constituting the contract are set forth in the complaint. The answer of the defendants admits the correspondence constituting the contract, but denies that the plaintiff was ready and willing to perform, and denies that defendants refused or neglected to perform on their part, but avers that they were at all times ready to perform "upon the performance by the plaintiff of the conditions imposed upon and agreed to by him." It claims that the plaintiff was indebted to the defendants in the month of July, 1879, and prior thereto, in the sum of $796.99, for coal and iron sold and delivered, and that *as part of the contract* for the sale

of iron, upon which this action was brought, it was a condition that plaintiff should pay to the defendants the said sum, and that they had requested the plaintiff to pay that sum, and offered to and were at all times ready to perform the said contract on their part, upon the payment to them of the sum so due them, and still are ready so to perform the same; but the plaintiff has at all times neglected and refused to pay the said sum. The answer also claimed that in the years 1876, 1877 and 1878, defendants had sold and delivered to the plaintiff large amounts of coal; that the plaintiff had received the same and claimed to have weighed it, and had reported various items of shortage; and that defendants, believing such statements, had allowed the plaintiff for such shortages at various times, various sums, amounting in all to $1,926.73; and the defendants claimed that the statements as to the shortage and weight of the coal were false and fraudulent, and that the deductions for such shortages were obtained by such false and fraudulent statements; that defendants upon ascertaining the falsity of these statements, demanded this sum back from plaintiff and demanded that he should pay the same before they would deliver the said iron, and that they then were and would be ready and willing to deliver, etc. And by the fifth and sixth counts of the answer, the defendants set up a claim for said $1,926.73, with interest from May 1, 1877, as a counter-claim, and asked judgment therefor against the plaintiff. The defendants also claimed that the plaintiff was indebted to the defendants for the above mentioned sum of $796.99, and demanded judgment therefor against the plaintiff as a counter-claim, in the fourth count of the answer. The answer did not allege that defendants had ever shipped or tendered a delivery of the iron, or plead any excuse or justification for not so doing, except the alleged refusal and neglect of plaintiff to pay the above mentioned sums of $1,926.73 and $796.99. (See answer, pp. 4–6, of the Record.) The plaintiff (defendant in error) replied to so much of the answer as was alleged by way of counter-claim, and denied the same, except that he admitted an indebtedness to the defendants of the sum of $112.73, on account of coal purchased prior to February 27, 1879, and alleged that the plaintiff had fully paid the defendants for all coal and iron delivered to plaintiff by the defendants, except the said sum of $112.73. (Reply, p. 7.) The issues in the action were, by written consent,

referred to Ward Hunt, Jr., of Utica, as sole referee to hear and determine the issues therein. (See stipulation, p. 9, fol. 18; order of reference, p. 10, fol. 19.) The referee made his report, dated November 27, 1883, by which he found the plaintiff was entitled to judgment against the defendants for the sum of $6,264.12, with interest from the date of the report and the costs of the action. (See referee's report, pp. 10–13, fols. 20–26.) Application was made to the Circuit Court for a new trial, which was denied, and judgment was directed upon the report, pursuant thereto, with costs. (See order of Circuit Court, p. 14, fol. 29; judgment, fols. 30, 31.)

A bill of exceptions was made by the defendants below, a copy of which is printed in the record, beginning at folio 32, page 15.

Since the issuing of the writ of error and the filing of the return in this court, Henry C. Roberts, one of the original plaintiffs in error, has died, and the case in this court has been continued in the name of Archibald S. Clarke, as survivor.

The assignment of error may be found on pages 52 and 53, folios 102 to 105.

POINTS OF DEFENDANT IN ERROR.

FIRST. THIS CASE HAVING BEEN SUBMITTED TO THE DECISION OF A REFEREE, UPON WHOSE REPORT JUDGMENT WAS RENDERED BY THE CIRCUIT COURT, THE ONLY QUESTION PRESENTED BY THE WRIT OF ERROR IS WHETHER THERE IS ANY ERROR OF LAW IN THE JUDGMENT RENDERED BY THE COURT UPON THE FACTS FOUND BY THE REFEREE.

Paine v. Cent'l Vt. R. R. Co., 118 U. S., 152, 158.
Bond v. Dustin, 112 U. S., 604, 606, 607 and cases there cited.
Boogher v. Ins. Co., 103 U. S., 90.
Tyng v. Grinnell, 92 id., 467.

SECOND. THE PLEADINGS AND THE FACTS FOUND BY THE REFEREE JUSTIFIED THE JUDGMENT RENDERED BY THE CIRCUIT COURT.

These facts, stated concisely, were substantially as follows:

On the 28th day of July, 1879, a contract was entered into by telegraph and mail correspondence between Benjamin (the defendant in error) of the one part, and H. C. Roberts & Co., of the other part, whereby Roberts & Co. promised and agreed to ship to Benjamin

a cargo of "No. 1" iron, containing 400 tons, about the 1st day of September, 1879, or as soon as they could manufacture it, to be delivered afloat at Milwaukee for the price of nineteen dollars and fifty cents per ton, to be paid for in four months after delivery, with interest at seven per cent after thirty days. (See Second and Third Findings, fol. 21.)

This contract had no relation to or connection with any other dealings between the parties, and the performance thereof by the defendants below was not conditioned upon the performance of any act on the part of the plaintiff other than as stated in the report of the referee. (See Fourth Finding, fol. 22.)

The defendants did not deliver the iron or any part of it to the plaintiff on or about the time specified in their offer, nor did they deliver it as soon as they had manufactured the required amount. They postponed the execution of the contract from time to time, and finally insisted, as a condition of the delivery of the iron, that the plaintiff should pay certain outstanding indebtedness on other dealings which defendants claimed to be due them; and also that payment for the iron should be made upon delivery, instead of upon four months' time, as had been agreed; that shipment should be by rail instead of by boat as had been agreed, and in installments of 100 tons per month instead of one cargo of the full amount, and that plaintiff should pay, in addition to the contract-price, one dollar per ton for freight.

Plaintiff did not comply with these conditions. The iron has never been delivered. At the time when the letter containing these conditions was sent by the defendants to the plaintiff below, November 7, 1879, the market value of the iron in question was thirty-four dollars per ton afloat in Milwaukee. (Fifth and Sixth Findings, fol. 22.) The report also found an indebtedness of the plaintiff below to the defendants of $117.02, for iron previously delivered to the plaintiff by the defendants. (Seventh Finding, fol. 23.) And also an indebtedness of $625.77, for coal sold and delivered to the plaintiff by the defendants in the months of October and November, 1878. (Ninth Finding, fol. 24.) The report found the facts against the defendants below upon their claim for damages by reason of shortage allowed through alleged false representations of plaintiff. (See Eighth Finding, fol. 23, p. 12.)

The sum for which judgment was directed was the balance remaining after deducting from the amount of damages sustained by the plaintiff for breach of contract by the defendants, the sums which were found due from the plaintiff to the defendants upon the previous coal and iron transactions.

This decision was clearly right.

1. *There can be no question that the correspondence constituted a complete and valid contract.*

See Tayloe v. Ins. Co., 9 How., 398
Mactier v. Frith, 6 Wend., 103,

2. *The facts found by the fifth finding of the referee (fol. 22. p. 11), clearly constituted a breach of the contract by the defendants below.*

The postponement of the execution of the contract by them, from time to time, was not a final breach, having been acquiesced in by the plaintiff below. But the insisting upon, as a condition of delivery, that the plaintiff should do several things which he was not bound to do, and the failure and refusal to deliver the iron at all, constituted a plain violation of the contract. These illegal conditions attempted to be imposed were as follows:

(*a.*) That plaintiff should pay certain outstanding indebtedness on other dealings, with which the contract in question was found by the fourth finding of the referee, to have no connection.

(*b.*) That payment should be made by plaintiff on delivery of the iron, whereas plaintiff was, by the contract, entitled to a credit of four months.

(*c.*) That shipment should be by rail instead of boat, and in installments of 100 tons per month, instead of one cargo of the full amount, and that plaintiff should pay one dollar per ton for extra freight, in addition to the contract-price.

It will be noticed that these conditions are some of them insisted upon by defendants below in their answer, and are the only grounds on which they justify their refusal and neglect to deliver the iron. (See answer, pages 4, 5 and 6.) Indeed, the answer virtually admits such refusal and neglect to deliver the iron, and justifies it by alleging the refusal of the plaintiff to pay the

sums of $1,926.73 and $796.99 claimed to be due to defendants from him; neither of which claims, as the referee finds, had anything to do with the contract in question, and, the first of which, had no foundation in fact or law.

3. *The measure of damages for the breach of such a contract is the difference between the contract-price and the market value of the article at the time of the breach of contract by defendants.*

Benj. on Sales (2d Am. Ed., edited by J. C. Perkins), § 870, and cases cited.
2 Sutherland on Damages, 372, and cases cited.

4. *The damages found by the referee were based upon and justified by this well-settled principle.*

THIRD. NONE OF THE EXCEPTIONS OF PLAINTIFFS IN ERROR TO THE REFEREE'S FINDINGS OF FACT (see Record, p. 38, fol. 70), OR TO HIS REFUSAL TO FIND FACTS AS REQUESTED (p. 37, fols. 68, 69), PRESENT ANY QUESTION THAT CAN BE CONSIDERED BY THIS COURT.

R. S., §§ 649, 700.
Miller v. Life Ins. Co., 12 Wall., 285, 300, 301.
Ryan v. Carter, 93 U. S., 78, 81.
U. S. v. Dawson, 101 id., 569.
Stanley v. Supervisors, 121 id., 535, 547, 548.

FOURTH. NONE OF THE ASSIGNMENTS OF ERROR ARE WELL MADE.

1. Upon the facts found there can be no question as to the validity of the contract; there was no element of uncertainty in it. The word "cargo" did not of itself indicate the number of tons to be delivered; but the referee has found that the parties meant by it a cargo of 400 tons. (Third Finding, p. 11.) *Id certum est quod potest reddi certum.*

2. The question whether there was a breach of said contract was one of fact, and this court cannot review the decision of the court below thereon. The facts found in the fifth finding of the referee constitute a clear breach of the contract. Indeed, such breach is impliedly admitted by the answer, taken in connection with the facts found by the referee.

3. The facts found by the referee in his eighth finding (p. 12), show that there was no ground for the claim of the plaintiffs in error, that the sum of $1,926.27, deducted by mutual consent for shortages from their account against defendant in error, should be allowed to them.

4. It being found as a fact that the word "cargo," as used in the contract, was understood by the parties to mean a cargo of 400 tons (Third Finding, p. 11), no error can be predicated upon a recovery on this amount, especially as the answer admitted that a cargo of 400 tons was intended. (*See second sentence in first count of answer, p.* 4.)

5. The referee and the court were right in holding that damages could be recovered on the basis of the market-price of iron in November, 1879.

The referee found that the defendants (plaintiffs in error) postponed the execution of the contract from time to time, and finally insisted *as a condition* of delivery that the plaintiff (defendant in error) should do certain things which he was not legally bound to do. The letter imposing these conditions was sent November seventh. (See Fifth and Sixth Findings, p. 11.)

It is true that by the contract the iron was to be delivered "*about* September 1, 1879, or as soon as they could manufacture it." It is also true that the measure of damages on the breach of a contract of this kind is ordinarily the difference between the contract-price and the market value of the article at the time the contract is broken. But when the time is extended, or the execution of the contract postponed by the defendant, or where the plaintiff has been willing to wait, at the suggestion or request or procurement of the defendant, the market-price is to be ascertained at the time of the *final termination of the negotiations.*

Ogle v. Earl Vane, L. R., 2 Q. B., 275; S. C. affirmed, L. R., 3 Q. B., 272.

In the case last cited the contract was for the sale of iron to be delivered by the twenty-fifth of July. The defendant delivered none by that date, nor up to the February following. Then the plaintiff went into the market, and the price having arisen since July, he sought to recover from the defendant, as damages for his

breach of the contract, the difference between the contract-price and the market-price in February. The defendant paid into court sufficient to cover the difference between the contract-price and the market-price in July. There was parol evidence from which the jury might infer that the plaintiff's delay was at the defendant's request. It was held that the plaintiff was entitled to a verdict for the full measure of damages.

In the case as reported in Law Reports, 2 Queen's Bench, Mr. Justice Blackburn says:

The plaintiff was willing to wait, at the request of the defendant, for the defendant's convenience, and he did wait a long time—until February; but if he had lost patience sooner, and refused to wait any longer, he would have had a right to bring his action at once for the breach in July. It is clearly a case of voluntary waiting, and not an alteration in the contract, and the length of time can make no difference. (P. 283.)

In this case, as reported, Law Report, 3 Queens Bench, 272, Kelly, C. B., giving the opinion of the Exchequer Chamber, says:

It would be contrary to common sense and justice, when there has been a series of proposals by the defendant, involving delay for his own benefit, and acquiescence on the part of plaintiff, that because there may be no binding contract varying the terms of the former contract, the plaintiff is to be tied down to the strict letter of the rule as to the measure of damages for the non-delivery of the goods, and not to be entitled to the damages consequent upon the delay. (P. 279.)

See also Hickman v. Haynes, L. R., 10 C. P., 598.

A similar doctrine was held by the Supreme Court of Vermont, in an earlier case, in which it was held, that an agreement to enlarge the time stipulated for the performance of a contract requires no new extraneous consideration to support it; the plaintiff's promise to accept performance within an enlarged time being a sufficient consideration to support the defendant's promise to perform within such enlarged time, and that in such case the market-price of the commodity at the time of the refusal to deliver it under the terms of the stipulation enlarging the time, and not the market price at the time it was to have been delivered by the original contract, governed the rule of damages. The court say in that case:

Had the defendants refused in January to deliver the oats, and there had been no enlargement of the time, the plaintiff could have

supplied himself at the then market-price which was the same as he had paid the defendants; but relying, as the case shows, on the defendants' delivering them along in the summer following, was, after the defendant's refusal, obliged to buy at a much higher rate.

Hill v. Smith, 34 Vt., 535, 547.

In Newton v. Wales (3 Robertson [N. Y. Superior Ct. R.], 453), the suit was for the breach of a contract for the delivery of naptha and benzole, contracted to be delivered on the eighteenth and twentieth days of August. After the contract time for delivery had expired, and up to the 21st day of November, 1862, plaintiffs called on the defendants for the oil on various occasions, to which the defendants uniformly replied that they expected the oil, or that it was coming along and would be there in a few days.

On the twenty-first of November, plaintiffs made a formal demand, and on the defendant's failure to deliver, brought the action. Down to October, there had been little, if any advance in the market-price of the commodities sold; but on the twenty-first of November, the market-price had advanced. The jury found a verdict in favor of the plaintiffs for $3,317, based upon the market-price November twenty-first. The General Term affirmed the judgment entered on this verdict, Chief Justice Robertson in his opinion saying:

The defendants could have relieved themselves from all the consequences of a rising market by actually refusing, not merely neglecting, to perform the contract at the end of the twenty days, or by a tender of the merchandise.

3 Robertson, 457.

The same doctrine seems to have been held by this court in Douglass v. McAllister (3 Cranch, 298).

6. The facts, as found by the referee, bring this case within the principle of the above authorities.

The iron was to be shipped "about September 1, 1879, or as soon as they (defendants) could manufacture it." The defendants did not ship as they agreed; but they postponed the execution of the contract, and finally, in November, deliberately violated the contract by imposing conditions on the plaintiff not warranted by the contract, which conditions are also insisted upon in the answer, and failed and neglected to deliver any of the iron.

Looking to the evidence brought before the court, by the bill of exceptions, the facts will be seen still more clearly to bring the case within the principle above set forth. On the third day of September, in answer to a telegram from plaintiff, the defendants telegraph: "Iron not ready to ship yet; doing best possible." (Fol. 73, p. 39.) On the eleventh of September, in answer to another telegram, and a letter of plaintiff, they write: "We have only got one hundred tons on dock towards your cargo, and we are doing all we can to get enough for your cargo." (Fol. 74, p. 40.) September thirteenth, plaintiff writes defendants urging delivery (fol. 75, p. 41), but this letter is not answered. October fourth, he writes again, urging delivery, and offering some concessions in regard to other matters in controversy between them, in order to obtain the iron contracted for, and closing the letter with a request for a definite answer, "as neither you nor I can afford to let this matter *hang along* any longer." (P. 41, *bottom of page.*) Receiving no answer to this, he writes again on the thirteenth (p. 42); and, on the twenty-second of October, defendants sent him a short letter saying that "Mr. Roberts is absent," and stating that they would not "entertain any arrangement for shipping coal or iron until we have pay from you for our weights as billed." Nothing is said in this letter about fulfilling or not fulfilling the old contract for a cargo of iron. (Exhibit 12½, p. 42.) On the seventh of November defendants write another letter to plaintiffs, imposing the conditions referred to by the referee in his fifth finding, and stating that on the next day they would prepare and forward a statement of their claim, and requiring him to deposit the amount of it in some bank in Milwaukee, to be paid to them on full receipt by him of the iron therein mentioned as "contracted for in August last," and giving him until December first to examine the statement and deposit the money, "*but no longer time.*" (Exhibit No. 13, p. 42.) This was the first letter in which defendants refused delivery, except upon these conditions, which were not in the contract, but were attempted to be imposed by the defendants below.

The "statement" was forwarded November eighth, and it showed a balance of $2,723.72, claimed to be due from the defendants to the plaintiff below, $1,926.73, of which consisted of the claim to recover back sums allowed by defendants to plaintiff for "shortage" of coal, on the ground of alleged false representations (see answer,

third and fifth counts, pages 5 and 6), which claim was wholly unsustained by proof, and found by the referee by his eighth finding (p. 12) to be without foundation in fact, and by his fourth conclusion of law (p. 13) without foundation in law. Roberts (one of the original defendants) testified: "I refused to deliver him (Benjamin) this iron until he settled his old account." (Fol. 52, pp. 27, 28.)

A more grossly inexcusable breach of contract was never proved.

7. The referee's report does not show that the market-price of iron at Milwaukee was any higher in November than in September. The evidence shows that in September it was from thirty to thirty-two dollars per ton; that it advanced in October to from thirty-four to thirty-six dollars, and that these prices continued through November and December. (P. 19.)

FIFTH. THERE IS NO GROUND FOR CLAIMING ERROR IN THE ADMISSION OR REJECTION OF EVIDENCE.

1. Such alleged errors cannot be considered by this court.

Paine v. Central Vt. R. R. Co., 118 U. S., 152, 158 and other cases cited under first point, *supra*.

2. There has been no sufficient specification or assignment of error under rule twenty-one. The assignment of errors does not indicate what rulings in this regard the plaintiff in error objects to.

3. If the court should examine the case, no error will be found.

(*a*.) The questions as to the quantity of iron contained in a usual cargo from Charlotte to Milwaukee were proper. (Pp. 16–18.) The term "cargo" did not of itself indicate how many tons were intended. The evidence was admissible under the familiar rule that where a word may have two or more meanings, extrinsic evidence is competent to show what was intended in the particular case.

1 Greenlf. on Ev., § 280, and cases cited.

In this case the court having adopted the meaning claimed by defendants in their answer (see second paragraph of first count of answer, p. 4); if error had been committed by the referee in admitting this evidence, it would be no ground for reversal.

(*b.*) The letter of November twenty-fifth was properly received in evidence. (P. 20.)

The plaintiff had testified that he put the letter in a box in his office, and by the custom of their business, either he or some one in his employ took the contents of the box to the post-office daily. (P. 19.) This evidence raised a presumption that the letter in question was mailed and received.

Howard v. Daily, 61 N. Y., 362.
Hetherington v. Kemp, 4 Camp., 192.
Dana v. Kemble, 19 Pick., 112.

As the admission of this letter by defendants did not add to the strength of plaintiff's case, and no part of the referee's report is based thereon, such admission, if erroneous would be no ground for reversal.

No other exceptions taken to the admission or rejection of evidence, seem to call for comment.

The judgment should be affirmed, with costs.

December, 1887.

MATTHEW HALE,
ESEK COWEN,
Of Counsel for Defendant in Error.

124-64

United States Supreme Court.

OCTOBER TERM, 1887.

No. 120.

ARCHIBALD S. CLARKE, SURVIVOR OF HENRY C. ROBERTS,
Plaintiff in Error,

AGAINST

HENRY M. BENJAMIN.

Supplemental Brief of Defendant in Error.

MATTHEW HALE,
ESEK COWEN,
Of Counsel for Defendant in Error, Albany, N. Y.

UNITED STATES SUPREME COURT.

No. 120.

ARCHIBALD S. CLARKE, SURVIVOR, ETC.,

Plaintiff in Error,

AGAINST

HENRY M. BENJAMIN.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

The brief of the plaintiff in error, filed December 7, 1887, perhaps requires some little comment. The learned counsel seems to have proceeded upon the theory that this court will examine the evidence to ascertain whether the referee was right in his findings of fact. As shown under our first point (page 5 of principal brief) and our third point (page 8) the practice of this court does not permit such examination. The following suggestions are made in answer to the points made by the counsel for the plaintiff in error:

I. In answer to the first point, that the contract was void for uncertainty, it is sufficient to refer to the third finding of the referee (page 11), which is as follows:

"The term cargo employed in this correspondence was understood by the plaintiff and the defendants to mean a cargo of four hundred tons."

As we understand the practice, this court will not look into the evidence to see whether this finding (which, as has already been pointed out, was a finding in support of the allegation made in the answer, and one of which plaintiffs in error have no right to complain), can be sustained upon the evidence.

It may properly be mentioned, however:

1. That defendant's answer states that the word cargo "*was understood* as a load of not over four hundred tons." (P. 4, fol. 7.)

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It may properly be mentioned, however:

1. That defendant's answer states that the word cargo "*was understood* as a load of not over four hundred tons." (P. 4, fol. 7.)

2. That in the letter of plaintiffs in error, dated November 7, 1879, they say that under certain conditions, "we will at once commence to ship you *the four hundred gross tons contracted for in August last as the amount of the cargo.*" (P. 42, fol. 78.)

The plaintiffs in error are not at liberty now to complain of a finding that the word "cargo" meant what they said it meant in their letter of November seventh, as well as in their answer.

II. In plaintiff in error's third point, the measure of damages is discussed, and it is claimed that the referee erred in taking the market-price of iron in November as the measure of damages instead of the market-price in December.

This proposition is discussed, pages 9 to 13 of our principal brief. Some additional authorities are cited by the counsel for the plaintiff in error. The one upon which he principally relies seems to be *Ex parte Llansamlet Tin Plate Co.*, L. R., 16 Equity Cases, 155. Reference to the report of that case will show that it does not at all conflict with the decision of the referee herein. The case of Ogle v. Earl Vane was recognized and approved; but it was held not to be applicable to the case then before the court. In the Llansamlet Company case the contract was for 300 tons of iron, 150 tons of best coke bars and 150 tons of common iron black plate, "delivery to be twenty tons of each per month." The deliveries were not duly made under the contract. There was no evidence of any request for the postponement of the deliveries. Sir James Bacon, Ch. J., in delivering the opinion of the court, says: "Ogle v. Earl Vane, does not, in my judgment, apply to this case, because that was a case of an entire contract and an entire failure." (P. 16.)

The case now before the court, it will be seen, was like that of Ogle v. Earl Vane. It was an entire contract and an entire failure. In the Llansamlet Company case, there was no proof of any request for forbearance. In this case the referee finds that the defendants (plaintiffs in error) "postponed the execution of the contract from time to time." (Record, fol. 22.) This is equivalent to a finding that the postponement was by mutual consent.

Looking at the evidence, if the court should do so, it will be found that on the eleventh of September, the defendants below did, in effect, ask for forbearance. They say, "we have only got

one hundred tons on dock, toward your order, and *we are doing all we can* to get enough for your cargo," etc. (Exhibit No. 9, p. 40.) On the thirteenth of September, the plaintiff (defendant in error), wrote the defendants urging them to "ship without delay as per order accepted." (Exhibit No. 10, p. 41.) On the fourth of October he again urges shipment, showing that up to that time there had been no refusal to perform by the defendants. (Exhibit No. 11, p. 41.) If the defendant's letter of October twenty-second (Exhibit No. 12½, p. 41), should be regarded as a refusal, it would not change the result, as the price of iron then was the same as on the seventh of November. (See testimony of William L. Brown, p. 19.) But it was not a refusal. The letter did not say that they would not ship the iron *already sold*, but that they would not "entertain any arrangement for shipment," that is, would make no other contract. It was not until the letter of November seventh (Exhibit No. 13), that there was a clear breach of the contract by insisting, as a condition of the fulfilling their contract which was admitted in that letter, upon plaintiff's doing certain things that he was not bound to do.

The counsel also relies upon the case of Norton v. Wales (1 Robertson, Super. Ct., 561). This decision was rendered by a divided court in December, 1863. The same case came before the same court again, under the name of Newton v. Wales, in December, 1865, when, by a unanimous decision, the court rendered the opinion, from which an extract is given on page 11 of our principal brief. The counsel also cites the case of Hewitt v. Miller (61 Barb., 567). In that case there was no pretense of any extension. There had been a breach at the fixed time, and afterwards negotiations for a compromise were had, which the court held did not extend the time at which the market-price was to be taken as the measure of damages.

The case of Baker v. Drake (53 N. Y., 211), also cited by the counsel, has no bearing whatever upon this question. That was an action for conversion, and the rule which had been stated in a former case (Markham v. Jaudon, 41 N. Y., 235), namely, that the plaintiff, in cases of conversion, was entitled to the highest market-price, from the time of the conversion to the time of trial, was repudiated, and the advance in the market-price from the time of the unlawful sale up to a reasonable time to replace it, after notice

of sale, was held to afford a complete indemnity and to be the proper measure of damages in that class of cases.

In Sleuter v. Wallbaum (45 Ill., 43), also cited by the counsel for the plaintiff in error, there was no question as to the effect of delay *at the defendant's request.* The contract in that case was to deliver 1,000,000 of brick, during the season of 1866, *as the plaintiff might request.* (P. 46). The defendant requested the court to charge (in substance) that the difference between the market-price and the contract-price of the brick, *at the time of the demand and refusal,* was the measure of damages. This was refused and an exception taken. (P. 45.) The court also charged, at the request of the plaintiff, that the proper measure of damages was the difference between the market and the contract-price at the time of such demand and refusal, "*or within a reasonable time thereafter* for procuring such a quantity, and in finding what is a reasonable time that the jury might consider the state of the market as to scarcity of brick or otherwise," etc. (P. 46.) This ruling was also excepted to, and the Supreme Court held both rulings erroneous, saying: "The question of how long would be reasonable was at least very indefinite. It might be one month, six months, or even a year, for aught we can know. Under it the jury are authorized, at any rate for a considerable period after the breach, to select the highest market-price as the measure. Such a rule would be indefinite and uncertain, while the other is simple, certain and easy of application." (P. 47.)

It is clear that the question here involved did not arise in the Illinois case.

There is nothing in the case of Currie v. White (37 How. Pr. R., 362), cited in the brief of plaintiffs in error, bearing in any way on the question now under discussion.

As to the effect of a postponement of the time of delivery in such cases, see, also,

Tyers v. The Rosedale, etc., Iron Co., L. R., 10 Exch., 195; reversing S. C., L. R., 8 Exch., 305.

The doctrine is stated in 2 Sedgwick on Damages (7th ed., 134; m. p. 364, note), as follows: "The measure of damages in contracts of sale may be affected by the *actual forbearance* of the vendee at the express or implied request of the vendor, although there is no

new contract between the parties" citing Ogle v. Earl Vane and Tyers v. Rosedale, etc., Iron Co. (*supra*).

III. The counsel for the plaintiff in error discusses the case as if the first of September was the date absolutely fixed by the contract for the delivery of the iron. The contract was in fact for shipping the iron "*about* September 1, 1879, or as soon as they could manufacture it." (Record, p. 11, fol. 21.) As to effect of word "about" in a contract for sale and delivery, see

Kipp v. Wiles, 3 Sanf. Supr. Ct. R., 585.

There is no finding as to the time when the plaintiffs in error could or did manufacture the iron in question, and the evidence does not show this. The referee only finds that "the defendants did not deliver the iron nor any part of it to the plaintiff on or about the time specified in their offer; nor did they deliver it as soon as they had manufactured the required amount." (Fifth Finding, p. 11.)

The inference from the report of the referee and from the evidence is that up to the time of the final refusal to deliver, November 7, 1879, the time for the performance of the contract had not expired. If plaintiffs in error had tendered the iron at any time before November seventh, it is clear that defendant in error could not have refused acceptance.

Kipp v. Wiles, *supra*.

IV. The argument of the counsel for the plaintiff in error on page 17 of his brief, that the iron was wanted for a particular purpose, and that defendant in error should have been limited by the price at which he could have bought iron to fulfill a particular contract, is entirely unfounded. There is neither finding nor evidence to sustain it.

Defendant in error was in the business of buying and selling iron. (Fol. 33, p. 16). Even if he had succeeded in filling the contracts for which he had expected to use the iron in question, at the rates prevailing in September, as the time for the performance of this contract had been extended, he had a right to recover damages based upon the market-price of iron at the time of the final breach. If he had then received it, he could have sold it at the then market-price, and his damages were properly estimated upon that basis.

There is no evidence nor any finding, as to when defendant in error did in fact buy iron to cover his contracts with his customers. He testified it was *after* September first (fol. 34, p. 16); *how long* after does not appear.

V. There is no foundation for the statement of the counsel that the rise in the market-value of iron in the autumn of 1879, was "the wildest speculation in iron ever known in this country," made on page 10 of his brief; and also in other parts of the brief.

The evidence is that through the month of September the market-price of the quality of iron in question. "averaged from thirty dollars to thirty-two dollars a ton, during October from thirty-four dollars to thirty-six dollars, and *during November and December the same prices.*" (William L. Brown's testimony, page 19.)

The referee found the market-price on the seventh of November to be thirty-four dollars per ton. (Sixth Finding, p. 11.)

VI. In answer to the fourth point of the plaintiff in error (p. 18), it is enough to quote the eight finding of fact of the referee as follows:

Eighth. Between April 20, 1876, and October 5, 1878, the defendants sold and delivered to the plaintiff a quantity of coal, a statement of the weights and prices of which was rendered by the defendants to the plaintiff. Upon receipt of the cargoes at Milwaukee, the coal was weighed at the dock by the plaintiff, and thereafter he submitted to the defendants a statement of the weights, and demanded a deduction on account of shortage in weight which he claimed to exist. The defendants assented to and allowed the claim for shortage, and the plaintiff paid the balance of the account in full. The claim for shortage was made by the plaintiff in good faith, upon the basis of weights taken at his dock, and the defendants did not in any manner object to the plaintiff's claim until after he had insisted upon the performance of the contract upon which this action was brought.

This finding of fact fully justifies the fourth conclusion of law on page 13.

The referee also refused to find the sixth request made by the defendants below, that the shortages were not correct, and that the coal was not correctly weighed at Milwaukee, (p. 37, fol. 69); and also refused to find the seventh request, that the defendants' weights of coal were correct, and that the plaintiff below was not entitled to credits for shortages. (Id.)

The evidence, if examined, will be found abundantly to sustain the finding of the referee, and also his refusals to find on this question.

VII. The fifth point of the plaintiff in error (p. 20 of his brief), requires no answer.

The contention that the fact that there was a difference of opinion between the parties as to the amount due upon former dealings, entirely disconnected with the contract in question, justified a refusal by one of the parties to perform the contract, unless the other party would accede to his demands with reference to another transaction entirely independent of the contract, is too preposterous to require refutation.

The other points discussed in the brief of plaintiff in error, are believed to be fully covered by our principal brief and are therefore not commented upon here.

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Of Counsel for Defendant in Error.